United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

F 486A

APPELLANT'S SUPPLEMENTAL APPENDIX
(Brief in U. S. District Court)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,181

DIANA KEARNY POWELL,

Appellant,

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Appellee.

Appeal from a Final Order of the United States
District Court for the District of Columbia

DIANA KEARNY POWELL, pro se
1500 Massachusetts Ave., N. W.
Washington, D. C. 20005
Appellant

United States District Court

FOR THE DISTRICT OF COLUMBIA

In the Matter of a Complaint against DIANA KEARNY POWELL, a Member of the Bar of the United States District Court for the District of Columbia	:	Miscellaneous No. 54-65

RESPONDENT'S BRIEF AND APPENDIX

DIANA KEARNY POWELL
Respondent, *pro se*,
1500 Massachusetts Ave., N.W.
Washington, D. C. 20005

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FOR THE DISTRICT OF COLUMBIA

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Charges of the Committee on Admissions and Grievances of the United States District Court for the District of Columbia against Diana Kearny Powell, a member of the Bar of that Court, for unprofessional conduct and conduct prejudicial to the administration of justice, were filed under Rule 94, Local U.S. District Court Rules, on October 25, 1965, and personally served November 2, 1965. (A 1-5). Respondent's Motion to Dismiss the Complaint was filed November 22, 1965 (A 9-10) and was denied after argument was heard, January 5, 1966. Respondent's Answer to the Complaint (A 10-11) was simultaneously filed November 22, 1965.

The case came on for trial on January 18, 1966, before the Honorable Judges Keech, Youngdahl and Walsh, with Roger Robb, Esq. appearing for the Committee and Respondent appearing *pro se*. Judicial notice was taken of the records in Adm. No. 12,657, Estate of Diana Kearny Powell, deceased (A 17-21); C.A. No. 4051-55, Lucy Powell v. Diana Kearny Powell, Owen Bullitt Powell, and George Cuthbert Powell (A 12-45); and CA No. 207-65, Powell v. Katzenbach (A 5-12); and related appeals as to each, including Appeal 16,071, Powell v. National Savings and Trust Company. (A 45-52). (Tr. 16-19, 22, 26, 31-36).

The Committee called as witnesses Judge Holtzoff (Tr. 9-11), Burger (Tr. 20 *et seq.*), Prettyman (Tr. 42-4), and Miller (Tr. 52-4), who each testified that the statements as to misconduct of two judges in the Complaint in CA 207-65, Powell v. Katzenbach, A 6-9, were without foundation. Objections to limitation of cross-examination as to the basis in the record for the testimony on direct examination were overruled, as to each. (Tr. 11, 22, 44, 54 *et seq.*). After determination by the Court that the matter to be elicited by cross-examination and by testimony by witnesses called by Respondent was covered in the records in Adm. No. 12,657 and C.A. No. 4051-55 (A 12-45), and related appeals, character testimony of one witness was taken (Tr. 70) and stipulation as to testimony by two other witnesses. (Tr. 75 *et seq.*) Records of more than fifty appointments of respondent in civil and criminal cases were read into the record (Tr. 71-4, 76-8), and Respondent's membership in the Bar of the Supreme Court of the United States noted. (Tr. 79)

The case was rested to allow preparation of this brief setting forth the matters of record and argu-

ment upon which Respondent relies for her defense. (Tr. 78)

The unprofessional conduct charged against Respondent consisted of allegations incorporated in Civil Action No. 207-65, Powell v. Katzenbach (A 5-12), a Complaint in the Nature of Petition for Mandamus seeking criminal action by the Attorney General against a bank, two attorneys, and two judges, for fraud. Paragraph Two of the Complaint alleged that the bank and two attorneys conspired to defraud the remainderman and embezzle the remainder estate of Diana Kearny Powell, deceased, by misrepresentations, A 6-7. Paragraphs Three and Four represented that the two judges aided and abetted the fraud by deliberate misstatements of facts and case law, and refused to correct patent misstatements when advised of the error. A 7-8. These misstatements were made in C.A. 4051-55, Lucy Powell v. Diana Kearny Powell, Owen Bullitt Powell, and George Cuthbert Powell, an action for appointment of the bank as successor trustee (A 12-45) of a trust established in Adm. 12,657, Estate of Diana Kearny Powell, deceased (grandmother of Respondent-Defendant of the same name). Lucy Powell, trust beneficiary and plaintiff in CA 4051-55, died September 1, 1958 (A 30), and distribution of one-third of the remainder was made to Diana Kearny Powell, the only one of the three defendant-remaindermen known to be in being, pending further investigation, on April 15, 1959 (A 25-29). Investigation disclosed all other remaindermen had died, none leaving surviving descendants to be substituted in their place other than Diana Kearny Powell, respondent-remainderman (A 30), under the terms of the will. (A 19) Not until September, 1959, over a year after termination of the trust, when the only remainderman sought final distribution of the

remaining two-thirds of the corpus, did the attorneys for the bank and the executors of the estate of Lucy Powell, deceased, raise spurious claims against the remainder estate, patently in conflict with the record and their former positions (A 12-45) by means of which they have embezzled most of the corpus, including much of the already distributed portion of the remainder, under color of authority of the misrepresentations of the judges. Appendix B.

Although the representations of the bank and its attorneys were patently contradictions of the record, the terms of the will, the case law, and their own earlier positions, the judges reiterated and added to these misstatements. The detailed analysis of these misstatements is set forth in Appendix B.

The fraud and misstatements were brought to Judge Holtzoff's attention on motion to set aside the Order heard October 3, 1960 (A 40-3); on trial date for the cross-claim against the executors of the Estate of Lucy Powell, December, 1960; and on motion to add the National Savings and Trust Company as Third Party Defendant, heard September 24, 1965.

The fraud and misstatements were brought to Judge Burger's attention in the following appeals: (1) No. 15,391, *Powell v. Ogden,* heard before the decision in question, 108 U.S. App. D.C. 6, 278 F.2d 451 (1960); (2) No. 16,071, *Powell v. National Savings and Trust Company, et al.,* 111 U.S. App. D.C. 290, 296 F.2d 412 (1961), in which the principal misstatements were made (A 45-52 and App. B, 6 *et seq.*); (3) Nos. 17,178 and 17,181, heard jointly, decided January 24, 1963, in which the testamentary grant of the corpus to the testamentary trustee were shown, including the consent by all parties to the final distribution to the testamentary trustee, William Glasgow

Powell, in 1905, appearing in Adm. 12,657 as part of the record in that case; (4) No. 19,547, *Powell v. Paige, et al.,* decided December 9, 1965. In each of these cases the misstatements were brought to the attention of the judge in the briefs and in oral argument, as well as in the petitions for rehearing en banc.

It is Respondent's position that her duty as an officer of the Court requires her to submit the matter to the proper authority under Canons of Professional Ethics, Canon 1. The Duty of the Lawyer to the Courts (Br.5-6). She submits that the Attorney General is a proper authority as set forth in her Complaint in CA 207-65 and the laws of the United States cited therein. (A 5-9). She submits that the record shows clear and irrefutable support for her allegations of misstatements (Appendix B). She submits that repeated refusal to correct patent misstatements after these were brought to the attention of all concerned and reliance upon the misstatements to justify embezzlement show deliberation and intent which would sustain criminal conviction under the ruling in *Braatelien v. United States,* 147 F.2d 888 (1945), and *United States v. Manton, et al.,* 2nd Cir., 107 F.2d 834, 838. She further refers to "Answer of Diana Kearny Powell to Letter of Complaint dated January 28, 1965 from Committee on Admissions and Grievances," submitted February 8, 1965.

CANONS OF PROFESSIONAL ETHICS

Preamble

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing

Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

. . .

1. The Duty of the Lawyer to the Courts

. . . Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

15. How Far a Lawyer May Go in Supporting a Client's Cause

. . . The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.

22. Candor and Fairness

. . . It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, . . . or the language of a decision or a testbook; . . .

Also see Canons 30, 32.

QUESTION PRESENTED

The question presented by the Complaint of the Committee is whether the allegation of misconduct against two judges in respondent's Complaint in CA 207-65, *Powell v. Katzenbach*, are false and without

justification or foundation in fact, A 3. Respondent submits that truth and foundation in fact are patent in the record in CA 4051-55, *Powell v. Powell,* and related cases. Appendix B.[1]

SUMMARY OF ARGUMENT

1. Factual grounds and justification for Respondent's Complaint are matters of record.

2. While a judge is not liable for errors committed in good faith, the judicial office is not a shield for crime or corruption.

3. The purpose of disbarment proceedings is to correct conduct prejudicial to the administration of justice. Respondent had a duty to take action against corruption. In doing so, her right of independence as a member of the Bar is equal to that of the Court itself.

ARGUMENT

1. Factual grounds and justification for Respondent's Complaint are matters of record.

The detailed analysis of the principal opinions, basis for Respondent's Complaint (A 5-10) is set out in Appendix B.

In summary, Judge Holtzoff's opinion of September 20, 1960 (A 38-9) interpreting a patently spurious question raised by the attorney of the trustee of the

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[1] Respondent holds the Committee to strict limitation to this question, whether the Attorney General is the appropriate authority to whom the Respondent's Complaint should have been addressed and the sufficiency of the Complaint not being in issue.

terminated trust, so misstated the grant of the remainder estate distributable after termination of the trust under the will of Diana Kearny Powell, deceased, Adm. 12,657 (A 19), as to reach the exact opposite of its plain meaning. B 1-6.

This allowed the trustee of the terminated trust almost the entire corpus (11th and Final Report) which the clear grant of the will directed to be divided equally among members of a specified class, i.e., five children of testatrix or issue of a deceased child in being at termination of the trust. (A 19, 40-5)

This was accomplished by reading into the will conditions which were not in it, divesting remaindermen dying with issue surviving. (A 19, 38-9, B 1-3) In effect, it repudiated the title in the trustee and so the entire action in which the question was raised, a Complaint brought by the trust beneficiary, Lucy Powell, for appointment of a successor trustee. (A 12-38, B 5-6) It imputed to the future interests of the remaindermen prior to termination of the trust the right of alienation which can exist only in a present interest. *Pyne v. Pyne,* 81 U.S. App. D.C. 11, 154 F.2d 297. (B 2, 4) It attempted to create in the deceased remaindermen an estate not recognized in law, one held in abeyance of the seisin after death until termination of the trust, and in conflict with the trust. (Br. , B 2, 4-5)

The purported authority, *Pyne v. Pyne,* was likewise misstated. (B 4-5)

It is incredible that such a fundamental misstatement of fact and law could have been made in good faith by one of Judge Holtzoff's experience and learning in the law. B-6. But to corroborate further the mala fides, we have Judge Holtzoff's refusal to admit error and correct the misstatement on at least four

subsequent occasions when the error was brought to his attention:

1. October 3, 1960, on motion for reconsideration (A 40-3).

2. December, 1960, CA 4051-55, on consideration of Cross-claim against the executors of the Estate of Lucy Powell, deceased. (Br. 4).

3. September 24, 1965, CA 4051-55, Motion to Add Trustee as Third Party Defendant and set aside Report of the Auditor. (Br. 4).

4. January 18, 1966, Misc. 54-65, the present case, when Judge Holtzoff testified under oath:

> ". . . the entire paragraph is a statement of falsehoods except the statement that I rendered an oral decision in that action. . . . I might add this: That it is a statement of deliberate falsehoods." Tr. 10-11.

Analysis of Judge Burger's opinion in No. 16,071, *Powell v. National Savings and Trust Company et al.*, decided July 31, 1961, 111 U.S. App. D.C. 290, 296 F.2d 412 (A 45-52), is set out in detail in Appendix B 6 *et seq.* It shows almost every sentence contains either a direct misstatement, or a sophistic innuendo, inferring a false conclusion from misstated premises and words taken out of context. The same general observations apply to Judge Burger as to Judge Holtzoff. B 1-6.

Particularly pertinent, however, is the confusion of trust beneficiaries, the testamentary trustee, and the remaindermen, by means of misstatements of fact, which, if they were as stated in the opinion, would entirely exclude the substituted remainderman, the appellant in that case and respondent in this. (Br.

). The opinion refers to William G. Powell, the testamentary trustee, as "last survivor," A 46, B 7, and in another paragraph states "In 1958 the last surviving of five life tenants of the trust estate died . . ." (A 46, B8) It further misstates the record as being an appeal from distribution of a "residuary trust," whereas it is final distribution of the remainder which was before the Court. (A 46, B 6) The Complaint and entire ensuing record in CA 4051-55 refutes the statements, showing without any shadow of a doubt that Lucy Powell, the survivor of two, not five, trust beneficiaries (A 19, 30), brought the action for appointment of a successor trustee on the death of the testamentary trustee, William Glasgow Powell, in 1955 (A 12-21), and that she, not William G. Powell, died in 1958 (A 30), at which time the trust terminated under the terms of the will. (A 19)

As in Judge Holtzoff's case, it is incredible that such patent misstatements were inadvertent, the mala fides being further corroborated by repeated refusal to admit and correct the misstatements on at least three specific occasions, as well as in the several petitions for rehearing en banc, when the errors were brought to his attention:

1. Decision in Nos. 17,178, appeal from decision in Adm. 12,657, Estate of Diana Kearny Powell, deceased; and 17,181, *Emilia Powell v. National Savings and Trust Company,* heard jointly and decided January 24, 1963. Tr. 25, Br. 4.

2. No. 19,547, *Powell v. Paige, et al.,* decided December 9, 1965. Tr. 26, Br. 5.

3. January 18, 1966, Misc. 54-65, the present case, when Judge Burger testified under oath:

"Well, I'll simply say that these charges are so

palpably false that I hesitate to even dignify them by responding . . ."

When confronted with the patent misstatements (B 6-9), Judge Burger became evasive, Tr. 31-2:

A. "I don't have the total record before me, but if we said that in the opinion, I am confident that that is a correct reflection of the record. If it was not, the dissenting opinion would surely have pointed it out. And I do not recall whether the dissenting opinion undertook to deal with it or not; but if it was wrong and if it was relevant, it surely would have been called to our attention.

Q. Your Honor, isn't it a fact that that was called to your attention and the misstatement was completely ignored on numerous occasions?

. . .

THE WITNESS: I believe you are misconstruing my response, Miss Powell. I said if it was relevant and if it was erroneous, it would have been made a point in the dissenting opinion, and I do not see that it was.

There are many statements made in briefs and records which you, as a lawyer, or other lawyers might think important which the Court doesn't consider relevant or important at all."

2. While a judge is not liable for errors committed in good faith, the judicial office is not a shield for crime or corruption.

Judicial discretion is described in *Alden v. Hinton*, 6 D.C. 217, as the option as to a thing, "the doing of which cannot be demanded as an absolute right of the party asking it to be done." In *Appeal of Lyfolmar*

Co., 48 Lack.Jur. 65, abuse of discretion is defined as overriding or misapplying the law, a judgment manifestly unreasonable or biased as shown by the evidence or record.

Serious misconduct in a judge has been held to include destruction or prejudice of the rights of a suitor, *Commonwealth ex rel. Duff v. Keenan*, 33 A.2d 244, 347 Pa. 574, and changing the court minutes to reflect a state of facts known to be false, *Saint v. Meraux*, 111 So. 691, 163 La. 242.

The oath of office requires a judge to "administer justice without respect to persons, and do equal right to the poor and to the rich . . ." U.S.C.A. Title 28, Ch. 21, sec. 453. June 25, 1948, c. 646, 62 Stat. 907.

It is the judge's duty to see that justice is done, *Bartel v. Riedinger*, 338 F.2d 61. In the Texas case of *Scott v. State*, 323 S.W.2d 445, the Court stated:

> "When a judge realizes that he is wrong and has erred in performance of his duty, he should not only be the first to admit it, but should do so without hesitation or equivocation."

The record in CA 4051-55 shows bias throughout in favor of the trustee bank in adopting its patent misrepresentations notwithstanding the record clearly showed it was fraud. (Br. 3-5, 7-11) (A 40-44, 46, 47, B 5-6, 9-10, 13-14, 15-16)

The fact that Henry H. Paige and Benjamin W. Dulany were guilty of professional misconduct in perverting the cause on the merits by misleading the court (Br.5-6, A 33-4, 38-45) (*Thomas v. Ogilby*, 59 App. D.C. 382, 44 F.2d 890, *Curtis v. Whiteford*, 59 App. D.C. 320, 41 F.2d 202), and deliberately procured fraudulent judgments and orders on the basis of their deception of the court (A 43-5) (*Ill. People v.*

Britlow, 140 N.E. 829, 309 Ill. 174; *In re Wilson,* 170 N.Y.S. 725) is not an excuse, Respondent submits, for Judges Burger and Holtzoff to adopt and approve their fraud after it was repeatedly brought to their attention. (A 40-1) The authorities all agree that the duty rests on the courts to maintain the integrity of the courts and the legal profession against practices that defeat the administration of justice. 7 C.J.S. "Attorney and Client. Deception of Court and Obstruction of Justice."

Respondent submits that the highest degree of integrity and good faith is required of both the legal profession and the Court in dealing with trusts. 54 Am. Jur. "Trusts." Br. 5-6.

In *Braatelien v. United States* (1945) 147 F.2d 888, 895, in which the appellant claimed judicial privilege, the Court held:

> ". . . a judge can not be held criminally liable for erroneous judicial acts done in good faith. 30 Am. Jur. Judges sec. 52. But he may be held criminally responsible when he acts corruptly. Judicial title does not render its holder immune to crime even when committed behind the shield of judicial office. The sufficient answer to this defense is that Braatelien was not indicted for an erroneous or wrongful judicial act. He is charged with conspiracy to defraud the United States by corruptly administering or procuring the corrupt administration of an Act of Congress."

The decision goes on to state that the crime was complete when "an overt act was consummated by any one of the conspirators . . ." It cites *United States v. Manton et al.*, 2d Cir., 107 F.2d 834, 838, and *United States v. Downing,* 2d Cir., 51 F.2d 1030, 1031.

3. **The purpose of disbarment proceedings is to correct conduct prejudicial to the administration of justice. Respondent had a duty to take action against corruption. In doing so, her right of independence as a member of the Bar is like that of the Court itself.**

The purpose of disbarment proceedings is to protect the public interest, to determine whether or not the attorney is a fit person to be allowed to continue in the privileges of an officer of the Court. *Re Wall,* 107 U.S. 265, 2 S.Ct. 569, 27 L.ed. 552; *In re Ades* (D.C. Md.), 6 F.Supp. 467.

In disbarment, a judgment in a civil action is not res adjudicata. *In re Tanz,* 252 N.Y.S. 769, 233 App. Div. 300. Hence, the action in striking the two paragraphs in question and on the question of whether mandamus would lie in CA 207-65, Powell v. Katzenbach, (A 5-8), is not here decisive. It does, however, raise the question as to whether portions stricken are not to be considered as no longer part of the pleading, and therefore not grounds for disbarment proceedings. Also to be noted is that the Court of Appeals did not decide this question, but rested its decision of December 2, 1965, in Appeal No. 19,285 solely on the question of mandamus.

The crux of the proceeding is the good faith and proper motivation of Respondent and the foundation in fact and in the record for making the charges. While some variance exists among the professional misconduct cases involving criticism of judges as to whether bona fides is a defense, all agree that the criticism must be false. *Duke v. Committee on Grievances of Supreme Court of District of Columbia* (App. D.C.), 82 F.2d 890, cer. den. 56 S.Ct. 751; *In re Ades* (D.C.Md.), 6 F.Supp. 467. If the criticism is

true and justified, the shoe is on the other foot, and it is the duty of the attorney to correct the matter. Canons of Professional Ethics, "Preamble" and "1. The Duty of the Lawyer to the Courts." (Br. 5-6)

The present case is clearly distinguishable from *Re Secombe,* 19 How. (U.S.) 9, 15 L.ed. 565, and *Bradley v. Fisher,* 13 Wall. (U.S.) 335, 20 L.ed. 646, in which invective and threats against a judge were held ground for disbarment.

It is also distinguishable from the *Duke* case, *supra,* in which the Court, quoting from *Moder v. U. S.,* stated:

> "The charges made by Mr. Duke are conclusions rather than statements of definite facts . . . We are therefore faced with a charge without supporting facts on which to base it."

Mr. Duke was afforded an opportunity to present the facts supporting his accusations and —

> "In answer to the foregoing direction of the Court, Mr. Duke declined to submit any other papers and failed to appear . . ."

In the concurring opinion, Associate Justice Stephens stated:

> "Respect for courts, judges, and prosecuting officials is necessary for the effectiveness of their functioning. *That respect must rest first, of course, upon a foundation of actual integrity . . .*" [Emphasis added.]

He further qualified the grounds for disbarment as an "*unfounded* attack upon the integrity of the court," citing *Booth et al. v. Fletcher,* 69 App. D.C. 351, 101 F.2d 676, *cer. den.* 59 S.Ct. 835, 307 U.S. 628, 83 L.ed. 1511.

This is far different from Respondent, who at the cost of personal hardship and loss over a period of several years, has repeatedly pointed out the fraud and misrepresentations without foundation in the record, originating with and benefiting the trustee bank, and its counsel. Br. 3-6, Appendix B. The factual basis for her complaint was submitted in her 34-page Answer to the Letter of the Committee dated January 28, 1965.

In her Answer, Respondent cited *Kilbourn v. Thompson,* 103 U.S. 168, 26 L.ed. 37, as authority that when no abusive language is used, criticism of judicial acts couched in respectful language is privileged when addressed to the proper authority, and distinguished *Petition of McNair,* 187 A. 498, 324 Pa. 48, 106 A.L.R. 1373, in which it was admitted that the magistrate's alleged mistakes were errors of judgment. It is Respondent's position that repeated reaffirmation after notice of the error and fraud (A 43-45), and reliance on the doctrine of res judicata, in the face of the well-settled rule that judgments obtained by mistake or fraud are not a basis for res judicata, exclude the possibility of honest error.

Respondent cites 7 *Am. Jur.* 2d, "Attorneys at Law. - b. In Relation to Court or Judge," sec. 26, citing *Ex parte Bradley,* 7 Wall. (U.S.) 364, 19 L.ed. 214, as follows:

> "In no case has it been considered that the power to disbar is an arbitrary or despotic one to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility. A sound judicial discretion controls the exercise of the power so that the right and independence of the bar will be scrupulously guarded and maintained by the court, to the same extent as it maintains the rights and dignity of the court itself."

CONCLUSION

WHEREFORE, Respondent having shown factual grounds and justification for her complaint against two judges, prays that the charges against her of professional misconduct be dismissed.

DIANA KEARNY POWELL
Respondent, *pro se,*
1500 Massachusetts Ave., N.W.
Washington, D. C. 20005

APPENDIX A TO RESPONDENT'S BRIEF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of a Complaint against DIANA KEARNY POWELL A Member of the Bar of the United States District Court For the District of Columbia	))))))	Misc. No. 54-65

CHARGES OF THE COMMITTEE ON
ADMISSIONS AND GRIEVANCES

The Committee on Admissions and Grievances of the United States District Court for the District of Columbia charges as follows:

1. That the respondent, Diana Kearny Powell, is a member of the bar of the United States District Court for the District of Columbia, having been admitted to practice on October 15, 1940.

2. That on or about January 26, 1965, the respondent signed, verified and filed in the United States District Court for the District of Columbia, a complaint in an action entitled Diana Kearny Powell v. Nicholas Katzenbach, Acting United States Attorney General, Civil Action No. 207-65.

3. That in the aforesaid complaint the respondent stated as follows:

"The Honorable Judge Alexander Holtzoff, on or about the 20th day of September, 1960, while sit-

ting as judge in the United States District Court for the District of Columbia, knowingly and deliberately misstated and perverted the facts and law in rendering an oral decision in Civil Action No. 4051-55, knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation of the criminal law of the United States described in paragraph Two hereof, and refused to reconsider or correct the misstatement and perversion of the facts and law, then or in subsequent proceedings, and further,

"The Honorable Judge Warren Earl Burger, on or about the thirty-first day of July, 1960, in rendering a decision in the appeal from the decision of Judge Holtzoff described in paragraph Three hereof, Appeal No. 16,071, in the United States Court of Appeals for the District of Columbia Circuit, knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of judge to pervert justice and aid and abet fraud and the commission of crime against the United States criminal code perpetrated by the National Savings and Trust Company, its Attorney Henry H. Paige, and Benjamin W. Dulany, in violation of 18 U.S.C. 645, 656, 1005, by deliberately falsifying the facts of record and the case law corruptly to obstruct and impede the due administration of justice, and thereafter refused to reconsider or correct the misstatement and perversion of fact and law when these were brought to his attention in subsequent proceedings.

"Plaintiff has exhausted every civil remedy, and because of the wealth and high office of the

persons involved, cannot obtain effective criminal action through usual channels.

"WHEREFORE, Plaintiff respectfully prays this Honorable Court to issue process in the nature of a Writ of Mandamus to Nicholas Katzenbach, Acting Attorney General, or to the United States Attorney General, if appointed, to proceed with duties imposed under 5 U.S.C. 291 as amended, Sec. 311a, to prosecute violations of Title 18, U.S.C., including Secs. 645, 656, 1005, by a national bank or its agents, or by an officer of the United States, as hereinbefore described."

4. That the allegations of misconduct, fraud and corruption, made against Judge Alexander Holtzoff and Judge Warren Earl Burger in the aforesaid complaint and set out above, were false and scandalous and were made by the respondent without justification or foundation in fact.

5. Upon the facts herein set forth, the Committee on Admissions and Grievances of the United States District Court for the District of Columbia believes and avers that the respondent, Diana Kearny Powell, has been guilty of professional misconduct and conduct prejudicial to the administration of justice.

WHEREFORE, the premises considered, the Committee on Admissions and Grievances of the United States District Court for the District of Columbia prays:

(1) That these charges be filed with the Clerk of this Court and that the respondent, Diana Kearny Powell, be tried upon said charges, pursuant to the statutes made and provided, and the rules of this Court.

(2) That the Clerk of this Court shall be directed forthwith to issue a summons to respondent commanding her to appear herein on a day certain and answer said charges.

(3) That in the event service of summons cannot be made upon respondent in the District of Columbia, that service be made in accordance with Rule 94 (f) of the Local Rules of the United States District Court for the District of Columbia.

(4) That respondent, Diana Kearny Powell, be forthwith suspended or disbarred from further practice of the law before the Bar of this Court and also from holding herself out to be an attorney at law in the District of Columbia.

(5) And for such other and further relief as the nature of the case may require and to this Court may seem just and proper in the premises.

THE COMMITTEE ON ADMISSIONS AND GRIEVANCES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

By: _____
Edmund L. Jones

_____
Francis W. Hill

_____
Roger Robb

MEMBERS

DISTRICT OF COLUMBIA, ss:

Edmund L. Jones, being first duly sworn, on oath deposes and says that he has read the foregoing

charges signed by him, and by Francis W. Hill and Roger Robb on behalf of the Committee on Admissions and Grievances of the United States District Court for the District of Columbia and knows the contents thereof; that as a member of said Committee he believes that the matters and things therein set forth are true.

Edmund L. Jones

SUBSCRIBED AND SWORN TO BEFORE ME THIS ___ DAY OF OCTOBER, 1965.

Notary Public

LET THESE CHARGES BE FILED

Chief Judge

[Filed January 26, 1965]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DIANA KEARNY POWELL, 1500 Massachusetts Ave., N.W., Washington, D. C. 20005, Plaintiff,	)	
v.	)	Civil Action No. 207-65
NICHOLAS KATZENBACH, Acting United States Attorney General, Department of Justice, Washington, D. C., Defendant.	)	

COMPLAINT IN THE NATURE OF PETITION FOR MANDAMUS

The jurisdiction of this Court is invoked under 28 U.S.C. Ch. 85, Sec. 1331, as amended; and under 5 U.S.C. sec. 291 as amended by Reorg. Plan No. 4 of 1953; 5 U.S.C. 311a, 18 U.S.C. 401(2), and Ch. 31, Secs. 645, 656, 1005; 28 U.S.C. Ch. 21, sec. 453. Plaintiff is a citizen of the United States and a resident of the District of Columbia. This cause arises under statutory duties of the Attorney General to prosecute violations of the Criminal Code of the United States by a national bank and its agents, and by officers of the United States, as hereinafter more fully appears.

1. Defendant is an officer of the Executive Branch of the United States charged with the duty of enforcing the laws of the United States and in the District of Columbia, including violations of Title 18, U.S.C., Ch. 31, Secs. 645, 656, Ch. 47, Sec. 1005; and charged with the duty of prosecuting public officers charged with the commission of indictable offenses against the United States or with corruption in office.

2. On or about the 17th day of September, 1959, the National Savings and Trust Company, a corporation doing business in the District of Columbia and a national bank within the meaning of 18 U.S.C. 656, 1005, acting as Successor Trustee of the estate of Diana Kearny Powell, deceased, Administration No. 12657 in this Court by appointment and as officer of the United States District Court for the District of Columbia in Civil Action No. 4051-55, Lucy Powell v. Diana Kearny Powell, Owen Bullitt Powell, and George Cuthbert Powell, within the meaning of 18 U.S.C. 645, and acting through its attorney Henry H. Paige and in conspiracy with Benjamin W. Dulany representing the executors of Lucy Powell, deceased, knowingly and

willfully, and for the purpose of obstructing justice, defrauding the remainderman Diana Kearny Powell, and embezzling the remainder estate of Diana Kearny Powell, for the purpose of retaining it in their own custody, and to convert it to the estate of Lucy Powell, deceased, by means of misrepresentation of the facts of record and perverting the law, and further,

3. The Honorable Judge Alexander Holtzoff, on or about the 20th day of September, 1960, while sitting as judge in the United States District Court for the District of Columbia, knowingly and deliberately misstated and perverted the facts and law in rendering an oral decision in Civil Action No. 4051-55, knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation of the criminal law of the United States described in paragraph Two hereof, and refused to reconsider or correct the misstatement and perversion of the facts and law, then or in subsequent proceedings, and further,

4. The Honorable Judge Warren Earl Burger, on or about the thirty-first day of July, 1960, in rendering a decision in the appeal from the decision of Judge Holtzoff described in paragraph Three hereof, Appeal No. 16,071, in the United States Court of Appeals for the District of Columbia Circuit, knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of judge to pervert justice and aid and abet fraud and the commission of crime against the United States criminal code perpetrated by the National Savings and Trust Company, its Attorney Henry H. Paige, and Benjamin W. Dulany, in violation of 18 U.S.C. 645, 656, 1005, by deliberately falsifying the facts of record and the case law

corruptly to obstruct and impede the due administration of justice, and thereafter refused to reconsider or correct the misstatement and perversion of fact and law when these were brought to his attention in subsequent proceedings.

5. Plaintiff has exhausted every civil remedy, and because of the wealth and high office of the persons involved, cannot obtain effective criminal action through usual channels.

WHEREFORE, Plaintiff respectfully prays this Honorable Court to issue process in the nature of a Writ of Mandamus to Nicholas Katzenbach, Acting Attorney General, or to the United States Attorney General, if appointed, to proceed with duties imposed under 5 U.S.C. 291 as amended, Sec. 311a, to prosecute violations of Title 18, U.S.C., including Secs. 645, 656, 1005, by a national bank or its agents, or by an officer of the United States, as hereinbefore described.

/s/ Diana Kearny Powell, Plaintiff

District of Columbia, SS:

I, Diana Kearny Powell, being duly sworn, say upon oath that I have read the foregoing Complaint in the Nature of Petition for Writ of Mandamus by me subscribed and know the contents thereof, and that they are true to the best of my information, knowledge and belief.

/s/ Diana Kearny Powell, Plaintiff

Subscribed and sworn to before me this 25th day of January, 1965.

(SEAL) /s/ Anna M. Thompson
Notary Public

/s/ Diana Kearny Powell, Attorney for Plaintiff
1500 Massachusetts Ave., N. W.
Washington, D. C. 20005

MOTION TO DISMISS THE COMPLAINT OF THE COMMITTEE ON ADMISSIONS AND GRIEVANCES

Comes now the respondent, Diana Kearny Powell, and respectfully moves this Honorable Court to dismiss the Complaint of the Committee on Admissions and Grievances charging her with professional misconduct, on the ground that:

1. The Complaint fails to show allegations made by the Respondent in Diana Kearny Powell v. Nicholas Katzenbach, United States Attorney General, Civil Action No. 207-65 of misstatements and perversion of the facts and law patent in the record of this Court in Civil Action No. 4051-55 by Judge Alexander Holtzoff and in Appeal No. 16071 by Judge Warren E. Burger (detailed by Respondent in her Answer to the informal charges of the Committee) are (a) false; (b) scandalous when incorporated in a formal pleading addressed to the United States Attorney General, charged with the prosecution of criminal acts; (c) were unjustified when brought before proper authorities and founded on facts of record.

2. The Complaint fails to show that duly authenticated allegations of criminal acts committed by judges of United States Courts and other influential parties, addressed to the Attorney General of the United States, render Respondent guilty of professional misconduct under Canon 1 of the Canons of Professional Ethics, "duty of the Lawyer to the Courts."

3. The Complaint fails to show in what respect complaint to the United States Attorney General of fraud and misrepresentation by judicial officers and other influential parties to a proceeding resulting in flagrant perversion of the law is prejudicial to the administration of justice.

4. The Complaint fails to state a cause of action upon which relief may be granted.

/s/ Diana Kearny Powell, Respondent pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss the Complaint of the Committee on Admissions and Grievances, with attached Memorandum of Points and Authorities and Exhibits was served by personal delivery at the office of the Committee on Admissions and Grievances, United States Court House, Washington, D. C., this 22nd day of November, 1965.

/s/ Diana Kearny Powell
Attorney at Law

ANSWER TO THE COMPLAINT OF THE COMMITTEE ON ADMISSIONS AND GRIEVANCES

Comes now the respondent, Diana Kearny Powell, and in answer to the Complaint of the Committee on Admissions and Grievances, respectfully shows to the Court as follows:

1, 2, and 3. Respondent admits the allegations of paragraphs 1, 2, and 3.

4 and 5. Respondent denies the allegations of paragraphs 4 and 5. She respectfully shows that the complaints which she made of misconduct, fraud and corruption do not constitute misconduct on her part which would subject her to suspension or disbarment from further practice of the law before the Bar of this Court because (a) they are proper statements of fact made in a pleading, using only the language necessary to describe the matters complained of; (b) they were addressed to the proper authority, that is, Nicholas Katzenbach, the Attorney General of the United States; (c) the matters complained of were true facts, patent in the records of this Court, the truth of which had been brought to the attention of the Committee on Admissions and Grievances; (d) the respondent acted in accordance with the highest standards of professional duty and ethics, as set forth in Canon 1 of the Canons of Professional Ethics, and for the purpose of protecting the public, the Court, and the profession from flagrant abuse.

WHEREFORE, Respondent respectfully prays the Court

1. To dismiss the Complaint of the Committee on Admissions and Grievances.

2. For such other and further relief as to the Court seems just and proper.

/s/ Diana Kearny Powell, Respondent pro se

Subscribed and sworn to before me this 22nd day of November, 1965.

/s/ A. C. Denterman (?)
Notary Public

My commission expires 4/1/66

Certificate of Service

I certify that a copy of the foregoing Answer to the Complaint of the Committee on Admissions and Grievances was served by delivering a copy thereof at the office of the Committee, United States Court House, Washington, D. C., this 22nd day of November, 1965.

/s/ Diana Kearny Powell
Attorney at Law

[Filed Sept. 13, 1955]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCY POWELL,
824 Stockton Avenue,
Cape May, New Jersey,
Plaintiff,

v.

DIANA KEARNY POWELL,
1500 Massachusetts
Avenue, N. W.
Washington, D. C.
and
GEORGE CUTHBERT POWELL,
Address unknown,
and
OWEN BULLITT POWELL,
Address unknown,
Defendants.

Civil Action
No. 4051-'55

COMPLAINT FOR THE APPOINTMENT
OF A SUCCESSOR TRUSTEE

1. Plaintiff is a citizen of the United States and a resident of Cape May, New Jersey. Defendants are individuals to be found in the District of Columbia and elsewhere as set forth in the caption of this complaint. The amount involved in this action is in excess of $3,000 exclusive of interest and costs.

2. Diana Kearny Powell died a resident of the District of Columbia and leaving a last will and testament bearing date the 25th day of May, 1895, and a codicil thereto bearing date the 27th day of June, 1902, which were duly admitted to probate and record in this court on January 9, 1905, in Administration No. 12,657. A copy of said will and codicil is annexed hereto as "Exhibit A".

3. By said will and codicil the entire estate of this testatrix, including both real and personal property, was devised and bequeathed absolutely and in fee simple to William Glasgow Powell, son of the testatrix, in trust. Said William Glasgow Powell as trustee was directed to pay the net income from said trust to his sisters Aimee Elizabeth Powell and Lucy Powell until the marriage or death of either of them, and upon the death or marriage of either of them said trustee was directed to pay the entire income to the remaining sister until her death or marriage. The codicil provided that upon the death or marriage of either Aimee Elizabeth Powell or Lucy Powell the income to be paid the remaining sister was limited to $1200 per annum and any income in excess of $1200 per annum was to be paid to the children of testatrix, equally, or their issue. Upon the death or marriage of both of said sisters, William Glasgow Powell was directed to distribute the entire principal of the trust estate, both real and personalty, to the children of the testatrix, the descendants of any child who died be-

fore the time of distribution to take the share of their deceased parent. Said will named William Glasgow Powell as executor.

4. Testatrix had five children, namely: (a) Aimee Elizabeth Powell, who died in Washington, D. C., on the 16th day of February, 1941, leaving no descendants. (b) Lucy Powell, plaintiff herein, who resides at Cape May, New Jersey, and having never married has received the net income from the trust estate since the death of her sister Aimee Elizabeth Powell. (c) William Glasgow Powell, the testamentary trustee, who died at Vence, Alpes, Maritimes, France, on the 11th day of May, 1955, leaving as his sole surviving descendant a daughter Diana Kearny Powell, defendant herein. (d) Owen Bullitt Powell, who, plaintiff is informed, believes and therefore avers, discontinued all communication with members of his family approximately in 1905 and has not been heard of since that date. Plaintiff is unable to ascertain whether the said Owen Bullitt Powell is deceased or whether he has living descendants. (e) George Cuthbert Powell, who, plaintiff is informed, believes and therefore avers, disappeared in 1916 without giving any notice or any information as to where he was going and who has not been heard of since the date of his disappearance. At the time of his disappearance George Cuthbert Powell had no living descendants and plaintiff is unable to ascertain whether the said George Cuthbert Powell is deceased or whether he has living descendants.

5. William Glasgow Powell, who was nominated executor under said will, duly qualified and served as such in Administration No. 12,657 in this court. On the 27th day of July, 1906, in his final act as executor he distributed personal assets of the value of

$19,501.53 to himself as residuary trustee. On June 1, 1940, the said William Glasgow Powell as trustee (having permanently established his residence in France) designated and appointed the National Savings and Trust Company of Washington, D. C., as his agent in the management of the personal assets of the trust estate. From that date until the death of William Glasgow Powell the National Savings and Trust Company has managed the personal assets of said estate and presently holds as agent the following trust assets:

United States Treasury Bonds carried at	$ 12,658.75
Corporate stocks of the value of	10,764.00
Principal cash in the amount of	162.14
Comprising a total of	$ 23,586.89

Plaintiff is informed, believes and therefore avers that the net income from said trust has never exceeded $1200 per annum.

6. The following real property is a part of the trust estate:

> Block 62, Lot 10, known as 824 Stockton Avenue, Cape May, New Jersey

The real property is assessed for tax purposes at the value of $750 and the improvements thereon are assessed for tax purposes at the value of $2800. Pursuant to a verbal agreement between plaintiff and William Glasgow Powell, trustee, plaintiff has paid all taxes, maintenance costs and the cost of repairs to said real property and has resided in said property rent free for a portion of the summer months of each year.

7. Plaintiff is informed, believes and therefore avers that there will be no administration of the

estate of William Glasgow Powell in France or in the United States.

8. The will and codicil of Diana Kearny Powell does not designate any successor or substitute trustee upon the death of William Glasgow Powell.

9. Plaintiff desires to have appointed as trustee to act in place and stead of William Glasgow Powell, deceased, the National Savings and Trust Company, a corporation organized under the laws of the United States applicable to the District of Columbia, having a place of business therein and authorized by law to accept such appointment. The National Savings and Trust Company has agreed to act as successor trustee if appointed by this court.

WHEREFORE, THE PREMISES CONSIDERED, plaintiff prays:

1. That process may issue against all of the defendants and that service by publication may be ordered against those not to be found in this jurisdiction.

2. That this court by its judgment and decree herein appoint the National Savings and Trust Company trustee to execute the trust created by the last will and codicil of Diana Kearny Powell, deceased, in the place and stead of William Glasgow Powell, deceased, with all the rights, titles, powers and discretions, and with all the duties and obligations by said will vested in and imposed upon the said William Glasgow Powell; that by the court's order title to the real estate in said trust be vested in said successor trustee.

3. And for such other and further relief as to the court may seem just and proper.

/s/ Lucy Powell, Plaintiff

STATE OF NEW JERSEY)
) ss:
COUNTY OF CAPE MAY)

I, the undersigned, do solemnly swear that I have read the foregoing complaint for the appointment of a successor trustee by me subscribed and know the contents thereof; that the matters and things therein stated of my own knowledge are true and those stated upon information and belief, I believe to be true.

/s/ Lucy Powell

SUBSCRIBED AND SWORN TO before me this 12th day of September, 1955.

/s/ Anne T. Ogden
Notary Public of New Jersey

My Commission expires: Jan. 30, 1956

/s/ Benj. W. Dulany [By R.E.M.]
Attorney for Plaintiff
822 Southern Bldg.
Washington, D. C.

[Filed Jan. 11, 1905, Register of Wills, D.C.]

"EXHIBIT A"

[Original will written in longhand]

LAST WILL AND TESTAMENT
OF DIANA KEARNY POWELL, WIDOW, OF
WASHINGTON, D. C.

I, Diana Kearny Powell, widow, of the City of Washington, in the District of Columbia, do make this my last will and testament:

First: I direct my executor, hereinafter named to pay my funeral expenses and debts.

Second: I give and devise unto my mother Mrs. Diana M. Kearny, for and during her natural life. the following real estate, viz: All those certain lots and pieces of ground in the city and county of Cape May, New Jersey, which were conveyed to me by my said mother by deed of October 28, 1891, of record in the Clerk's office of Cape May County, at Cape May Court House, New Jersey, in Book 98 of Deeds, pages 455 et seq:, and also all that certain tenement and parcel of ground in the city of St. Louis, Missouri, which was conveyed to me by my said mother by deed of May 20, 1895, being known and distinguished as lot forty one (41) and parts of lots forty (40) and forty-two (42) in Block Nine Hundred and Twenty Two (922) being a piece of land fronting on the south side of Pine Street fifty feet (50 ft:), by a depth of one hundred and nine 33/100 feet (109 33/100 ft:) to an alley, improved by a three story brick dwelling, known as No. 2340 Pine Street in said city of St. Louis, Missouri.

Third: Upon the death of my said mother, and the termination of her life estate hereinabove devised, or immediately upon my own death, should I survive her, I give and devise the above described property in Cape May, New Jersey, and in St. Louis, Missouri, unto my son William Glasgow Powell, and his heirs forever, in and upon the trusts hereinafter declared in the next succeeding and residuary clause hereof.

Fourth: All the rest and residue of my estate, real personal and mixed, of whatsoever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized and possessed, I give, devise and bequeath unto my said son William Glasgow Powell, and his heirs forever, in

and upon the following trusts viz: first, to collect and reduce into money all the personalty and the same to safely invest, and from such investment and from the realty hereby devised, to collect the profits, income and rents, and after deducting and paying therefrom all costs and charges necessary for the preservation of the property, including taxes, levies, assessments, insurance and repairs, and his own proper expenses and commissions, secondly, to pay the net residue in equal parts semi-annually, to my two daughters, Aimee Elizabeth Powell and Lucy Powell, to each one-half, until the marriage or death of either, whichever event shall first happen, and thirdly, upon the marriage or death of one of my said daughters, then and thereafter to pay the whole of said net income, semi-annually, to the other daughter, if alive and unmarried, and upon the marriage or death of both daughters, then fourthly & finally to divide the said property absolutely and in fee, either in kind or by sale & conversion into money, equally between my children now living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified.

Fifth: I nominate and appoint my said son, William Glasgow Powell, executor of this my will, and

guardian of the persons of my said daughters, and direct that no security be required of him on his official bond, in either capacity; and I further empower him as Trustee to sell and convey any and all property hereby devised, without liability on the purchasers to see to the application of the purchase money, but charging my said Trustee with the duty of reinvesting the same according to the Trusts hereof, further authorizing him to change the form of such and all investments as the best interest of my children, shall, in his judgment require.

Sixth: Should either or both of my said daughters be under age and unmarried at the time of my death, the income from the estate may be applied by my said Trustee toward their support, maintenance and education, unless means therefor be supplied from some other source, of the sufficiency of which my said Trustee shall judge; but if he do not apply such income for such purposes, he shall reinvest the same, to be paid to them upon attaining full age, as above directed.

In Testimony, whereof, I have hereto subscribed my name and affixed my seal in the City of Washington, District of Columbia, this twenty fifth (25th) day of May, 1895.

/s/ Diana Kearny Powell (SEAL)

Signed, sealed, published and declared by the above named testatrix, Diana Kearny Powell, as and for her last will and testament in our presence, who, in her presence and at her request, and in the presence of

each other have hereunto subscribed our names as attesting witnesses.

dead /s/ Reginald Fendall

/s/ Leonard J. Mather

/s/ Marfan H. S._____ (?)
[Morgan H. Beach]
(added by D.K.P.)

I, DIANA KEARNY POWELL, being of sound and disposing mind, do publish and declare this as a codicil to my last will and testament, revoking said last will and testament, insofar as it is inconsistent with this codicil.

1st. If the income from my estate left to my two daughters Aimee Elizabeth & Lucy, amounts to exceed Eighteen Hundred Dollars ($1800) I direct that one-half of the said income, be paid to each separately & not to them jointly, as provided in my last will and testament —

2nd. If, on the death or marriage of either of my said daughters, Aimee Elizabeth & Lucy, the income left to the other under the terms of my last will & testament, exceeds the sum of Twelve Hundred Dollars ($1200) I direct that the amount ($1200) be all that shall be paid to such daughter as may be entitled to the income under my last will & testament, & the surplus of my income over the said sum of Twelve Hundred Dollars (1200) be divided equally among such other of my children, as may be alive at such distribution and their heirs —

/s/ Diana Kearny Powell

Diana M. Kearny
Therese L. Coles
Lucy Minnegerode

Cape May, New Jersey
June 27, 1902

[Filed October 3, 1955]

ANSWER OF DEFENDANT
DIANA KEARNY POWELL

The defendant Diana Kearny Powell states that she has read all of the allegations contained in the complaint filed herein by Lucy Powell and that to her best knowledge and belief all of the allegations made therein are true and she hereby joins the plaintiff in praying to this Honorable Court for the appointment of National Savings and Trust Company as successor trustee to execute the trust created by the last will and codicil of Diana Kearny Powell, deceased, with all of the rights, titles, Powers and discretions, and with all of the duties and obligations by said will vested in and imposed upon William Glasgow Powell, the deceased trustee.

/s/ Diana Kearny Powell
1500 Massachusetts Avenue, N. W.
Washington, D. C.

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

I, the undersigned, DIANA KEARNY POWELL, being first duly sworn, on oath depose and say that I reside at 1500 Massachusetts Avenue, N. W., Washington, D. C., and that I am the daughter of William Glasgow Powell and the niece of George Cuthbert Powell and Owen Bullitt Powell; that from my conversations with members of the family I have ascertained that Owen Bullitt Powell discontinued all com-

munication with members of his family in approximately 1905 and has not been heard from since that date; that I have made efforts to locate the said Owen Bullitt Powell by writing members of his family and have not been able to ascertain whether he is living or dead, or, if living, where he resides; that from the information which I have been able to obtain the said Owen Bullitt Powell to my best information and belief is a non-resident of the District of Columbia and has been a non-resident for the past six months.

Affiant further states that George Cuthbert Powell disappeared in 1916 without giving any notice or telling anyone connected with the family where he was going, and upon information and belief said George Cuthbert Powell has not been heard from since the date of his disappearance; and affiant does not know whether said George Cuthbert Powell is living or dead or, if living, where he resides; affiant has attempted to locate the said George Cuthbert Powell by writing various members of the family and has been unable to obtain any information with regard to his whereabouts; that affiant believes that the said George Cuthbert Powell is a non-resident of the District of Columbia and has been a non-resident for the six months preceding the execution hereof.

/s/ Diana Kearny Powell

[Jurat]

[Filed January 2, 1956]

ORDER

Upon consideration of the pleadings filed herein and it appearing to the Court that all defendants have

been duly served by publication and that none of the defendants has stated any objections to the prayers contained in the complaint, it is this 2nd day of January, 1956,

ORDERED, That the National Savings and Trust Company, Washington, D. C., be and hereby is appointed Successor Trustee in the place and stead of William Glasgow Powell, deceased, to execute the trust created by the last will and codicil of Diana Kearny Powell with all of the rights, titles, powers and discretions, and with all the duties and obligations by said will and codicil vested in and imposed upon the said William Glasgow Powell, this Order to be without costs.

/s/ Charles F. McLaughlin
Judge

[Filed January 3, 1956]

DEFAULT

It appearing from the record that the defendants George Cuthbert Powell and Owen Bullitt Powell have failed to enter their appearance, plead or otherwise defend this action although duly published against as specified in the Order passed herein on October 31, 1955, proofs of publication and an affidavit from plaintiff's attorney having been filed, as required and the time specified in said Order having expired, it is this 3rd day of January, 1956, declared that the said defendants, George Cuthbert Powell and Owen Bullitt Powell are in default.

HARRY M. HULL, Clerk
By Lloyd E. Dietrick, Deputy Clerk

[Filed March 31, 1959]

REPORT OF THE AUDITOR

On Third Account and Report of National Savings And Trust Company, Successor Trustee under will And Codicil of Diana Kearny Powell, Deceased, Filed Jan. 12, 1959

To the United States District Court
for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. The trust was established in the residuary clause of the will of Diana Kearny Powell (Administration No. 12657). Copy of the will is annexed to the complaint filed September 13, 1955. Briefly, the testator gave her entire estate to her son William Glasgow Powell, in trust, to pay the net income, in equal shares, to her daughters Aimee Elizabeth Powell and Lucy Powell, until the marriage or death of either, whichever happens first, and upon the marriage or death of either, to pay the whole of the net income to the other daughter if alive and unmarried, and upon the marriage or death of both daughters to divide the property equally between her children William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell and said Aimee Elizabeth Powell and Lucy Powell, the descendants of any who die before division to take their parents' share. Aimee Powell died February 16, 1941, leaving no descendants. Lucy Powell died September 1, 1958, leaving no descendants. William G. Powell died May 11, 1955, survived only by his daughter Diana Kearny Powell. Owen Bullitt Powell has not been heard from since 1905 and George Cuthbert Powell has not been heard from since 1916, and it is not known whether they are

living or dead or left descendants. The account shows distribution of one-third personal assets of principal as of September 1, 1958 and one-third of income as of December 10, 1958 to Diana Kearny Powell. The remaining two-thirds of personal assets and income, together with real estate known as Block 62, Lot 10, improved by premises 824 Stockton Avenue, Cape May, New Jersey, are retained by the Trustee, pending endeavor to locate Owen Bullitt Powell and George Cuthbert Powell, or their issue, if any.

2. Said Third Account, covering the period from January 4, 1958 through December 10, 1958, has been audited and found to result in the following balances for future accounting.

	Principal	Income	Total
Stocks, carried at	$ 8,779.00		$ 8,779.00
Cash	9,992.00	$128.12	10,120.12
	$18,771.00	$128.12	$18,899.12

The foregoing balances represent two-thirds of value of Principal Personal Assets as of September 1, 1958, and income from September 1, 1958 to December 10, 1958, retained by the Trustee for future distribution when the remaindermen entitled thereto shall have been determined.

3. The account shows the additional one-third value of personal assets of principal at September 1, 1958, and income from September 1, 1958 to December 10, 1958, distributable to Diana Kearny Powell, only surviving issue of William G. Powell, who died May 11, 1955, pursuant to Item Fourth of Will of Diana Kearny Powell, deceased, as follows:

		Principal	Income	Total
Stocks, carried at		$4,269.13		$4,269.13
Cash	$4,647.09			
Trustee's commission	469.28	5,116.37	$63.11	5,179.48
		$9,385.50	$63.11	$9,448.61

4. The account further shows proposed distribution of $615.97 to the Estate of Lucy Powell, deceased life tenant, who died September 1, 1958, representing accrued income to the date of death.

5. Said account shows commission to the Trustee as follows:

From Principal:

5 per cent of $344.39 being principal disbursements to December 10, 1958	$ 17.22	
5 per cent of $9,385.50 being market value of personal assets, distributed to Diana Kearny Powell, as of September 1, 1958	469.28	$486.50

From Income:

5 per cent of $353.47 income collected from August 11, 1958 through December 10, 1958	$ 17.67

The Auditor recommends that said commission be allowed as listed above.

In a memorandum included in said account, the successor Trustee reserves its right to commission on real estate and on share of personalty not distributed as of December 10, 1958.

6. All stocks exhibited have been examined and found to correspond with the Trustee's annual report filed January 12, 1959.

The total amount on deposit as of December 10, 1958, the closing date of the Third Account, was found to be $15,950.46, subject to withdrawal of commission items included as disbursements in said account, totaling $34.89, resulting in a reconciled cash of $15,915.57, which agrees with the total cash for which the Trustee is accountable as of December 10, 1958.

7. The Auditor recommends that the Trustee be allowed the following item:

Auditing charge for auditing account of the Trustee and for this Report to the Court, including $13.00 for verifying deposits, requiring trip to bank, as provided by Rule 22(d)	$53.00

8. Copies of this report have been sent by mail to The National Savings and Trust Company, Diana Kearny Powell and Messrs. Douglas, Obear and Campbell.

9. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following:

National Savings and Trust Co.,
15th St. & New York Ave., N.W.,
Washington 5, D. C.

Diana Kearny Powell,
1500 Mass. Ave., N.W.,
Washington, D. C.

Messrs. Douglas, Obear & Campbell,
822 Southern Building,
Washington 5, D. C.

Respectfully submitted,

/s/ Fred J. Eden

Auditor

[Filed April 15, 1959]

ORDER APPROVING REPORT OF AUDITOR AND THIRD ACCOUNT AND REPORT OF NATIONAL SAVINGS AND TRUST COMPANY SUCCESSOR TRUSTEE UNDER WILL AND CODICIL OF DIANA KEARNY POWELL, DECEASED, FILED JANUARY 12, 1959

Upon consideration of the report of the Auditor upon the Third Account and Report of the National Savings and Trust Company, Successor Trustee under the will and codicil of Diana Kearny Powell, deceased, filed herein on the 12th day of January, 1959, and said Report of the Auditor having been filed herein the 31st day of March, 1959, and the time for filing objections and exceptions to said report and the account having expired, and no objections or exceptions having been filed, it is by the Court this 15th day of April, 1959,

ORDERED, that said Report of the Auditor filed herein on the 31st day of March, 1959, and the Third Account and Report of the National Savings and Trust Company, Successor Trustee herein, be and the same are hereby fully approved, ratified and confirmed.

/s/ Alexander Holtzoff
Judge

Excerpt from Exhibit D [To Motion]

In re: Estate of DIANA KEARNY POWELL

1. WILLIAM GLASGOW POWELL
   b. September 8, 1871
      St. Louis, Missouri
   m(1) ALICE Van VOORHEES JOLINE --- 1. STILLBORN INFANT
      February 8, 1902 : b. 1906
      Camden, New Jersey : San Francisco, Calif.
      d. July 8, 1926 :
         Camden, New Jersey 2. DIANA TEMPLE KEARNY POWELL
            b. April 15, 1910
            Washington, D.C.

   m(2) EMILIA CATHERINE LUMPERT--- NO ISSUE
      November 24, 1928
      Washington, D. C.
   d. May 11, 1955
      Vence, Alpes
      Maritimes, France

2. OWEN BULLITT POWELL
   b. August 12, 1872
      Cape May, New Jersey
   m(1) CLARELLA aka CLARITA STANLEY 1. OWEN B. POWELL, Jr.
      May 25, 1910 b. June 24, 1913
      Chicago, Illinois Louisiana, Missouri
      d. July 15, 1935
         Louisiana, Missouri

DIANA KEARNY
b. January 4, 1844
m. ROBERT RANDOLPH POWELL--
June 21, 1870
Cape May, New Jersey
d. November 30, 1904
Washington, D. C.

m(2) MRS. MILDA E. BECKER-------- NO ISSUE
June 9, 1918
St. Jacob, Illinois
d. March 26, 1936
St. Jacob, Illinois

3. GEORGE CUTHBERT POWELL
b. July 26, 1876
Cape May, New Jersey
m(1) HELEN von LENTEN ---------- NO ISSUE
1910
New York
m(2) DOCIA McGOWAN --------- NO ISSUE
March 12, 1939
Hollis, Oklahoma
d. February 3, 1943
Amarillo, Texas

4. AIMEE ELIZABETH POWELL
b. September 22, 1879
Cape May, New Jersey --------- NO ISSUE
d. February 16, 1941
Washington, D. C.

5. LUCY POWELL
b. August 24, 1881
Cape May, New Jersey ---------- NO ISSUE
d. September 1, 1958
Cape May, New Jersey

[Filed November 15, 1960]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

* * *

[1] Washington, D. C.
January 29, 1960

* * *

[7] CHARLES W. FITZGERALD

called as a witness, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS POWELL:

Q. Mr. Fitzgerald, will you state your name and [8] occupation? A. Charles W. Fitzgerald, trust officer, National Savings and Trust Company.

Q. Are you familiar with the facts of the trust estate of Diana Powell, deceased? A. You say the effects?

Q. With the estate; are you familiar with the facts in connection with the estate? A. I am familiar with the estate, yes.

Q. You have been handling it for the bank, have you not? A. I have.

Q. How long have you been handling the estate? A. Well, when your father went to Europe, during the life of your father as agent and after his death, as successor trustee to the present time.

Q. You handled it as the agent? A. We were agents for your father, who was trustee, and subsequent to that we were successor trustee.

Q. Now, Mr. Fitzgerald, in the handling of this estate, was any claim made on it on behalf of Owen Bullitt Powell or the estate of Owen Bullitt Powell? A. No, there was not.

Q. Was any attempt made to locate Owen Bullitt Powell or his successors prior to the death of the life beneficiary? A. I didn't understand part of the question.

[9] Q. Was there any attempt to locate Owen Bullitt Powell or his successors? A. Yes, there was.

Q. What attempt was made? A. We secured the services of American Archives Association to endeavor to find out whether or not Owen Bullitt Powell was alive or deceased and whether he left heirs or issue. They furnished us with a report and on that basis we determined that he left no surviving heirs or issue.

Q. What was the position of the bank as to the rights of Owen Bullitt Powell or his estate in the trust estate of Diana Kearny Powell?

MR. PAIGE: I object to the question, your Honor.

THE COURT: And the reason?

MR. PAIGE: It calls for a legal conclusion.

THE COURT: Doesn't it call for a legal conclusion, Miss Powell?

MISS POWELL: It calls for a fact as to how the bank proceeded.

THE COURT: The Court is perfectly willing that you go ahead and ask Mr. Fitzgerald exactly what he did, but not any conclusion.

MISS POWELL: I will rephrase my question. I

will leave the question of Owen Bullitt Powell's estate for a moment and go to the question of George Cuthbert Powell.

[10] BY MISS POWELL:

Q. Was similar action taken as to George Cuthbert Powell? A. It was, yes.

Q. And what was found as to him? A. We found that he left no issue surviving.

Q. Was any action taken as to Aimee Elizabeth Powell? A. Yes, with respect to all of the children of the decedent, of the testatrix.

Q. As to Aimee Elizabeth Powell — A. Yes.

Q. — what was found? A. She had no issue and never married.

MR. PAIGE: May I intercede for just a minute, Your Honor. All of these questions are a matter of record within this file. I have no objection to the questions being asked. My purpose in interrupting at this point is to perhaps conserve the time of the Court. The report from which Mr. Fitzgerald is answering these questions, the report of the American Archives Association, is filed in the record in this case.

MISS POWELL: Well, I think that it is necessary for the questions to come in a couple minutes, half a minute, I should say.

BY MISS POWELL:

Q. Was the same found as to Lucy Powell? A. She had no issue.

[11] Q. Now, did I inquire, was any inquiry made at the bank by me or any other person as to the rights —

A. As to rights? I don't understand that question.

Q. — as to the rights to the property?

THE COURT: Any claims.

THE WITNESS: No one filed claims other than yourself.

BY MISS POWELL:

Q. Now, were the estates of these various remaindermen notified of any rights to the estate? A. Not by us.

Q. You were familiar, were you not, with the provisions of the codicil of the will? A. Yes, I was.

Q. You were familiar with the fact that it provided for a residuary interest in the remaindermen, who were not life beneficiaries, over a certain amount, were you not? A. Yes, I was.

Q. Was any attempt made to locate the estate of these various parties to apprise them of that interest? A. Not until the death of the surviving life tenant.

Q. Was any claim made by the estates of any of these persons other than — A. No.

Q. Was any inquiry made as to the disposition of the real property under the will? A. Inquiry by [12] whom?

Q. Inquiry by me or anyone else? A. You were the only one who raised any question about distribution; no one else did.

Q. Was the — I am trying to think of a way not to make this leading — was inquiry made as to whether the whole of the real property was to go to one person or be divided up? A. Naturally, we consulted our

counsel, yes. We were uncertain as to who the heirs were and we asked advice of counsel as to who the persons were.

Q. Was any offer made to make a settlement of the real property? A. Was there any offer made for what?

Q. Any offer made to keep the real property intact? A. I don't understand the question.

Q. Let me refresh your memory a little bit. Didn't I ask you if there was any question that if there might be other rights to the real property, to permit me to apply my share in the cash assets on the real property so that it could be kept intact? A. You did state that, if possible, you would like to acquire the real estate in your own name.

Q. Yes. What was your answer to that? A. What was done?

Q. What was your answer to my offer? A. I don't [13] recall, but I believe it to be a fact that I did not then know who the heirs were and I did not know what disposition would be made of the real property.

Q. Wasn't your answer that it wasn't necessary because it all belonged to me anyway? A. It was my impression at the early part, after her death, that you were the one who would receive it. It wasn't until after counsel raised the question as to the wording of the will that we had a very serious doubt as to who the remaindermen were, of the estate. Thereafter, we had no idea who they were and we tried to locate all the heirs.

Q. Well, isn't it a fact that for a period from 1929 or 1930 until nearly a year after the death of the life beneficiary, no question was raised that there was

any right to the real property or to the estate in anyone except the direct descendants? A. I believe I stated that no question was raised by anyone other than you as to the distribution.

Q. Now, was any effort made to get consent or approval from the estates of any of the five remaindermen — any of the three remaindermen, who were not life beneficiaries, to apply the real property, the income from the real property and the use of the real property, to the life beneficiary and not in accordance with the provisions of the will to have it invested or rented and applied to the other residuary legatees? [14] A. No, nothing was done to that extent.

Q. Was anything done to get the consent of the estate of Owen Powell? A. We didn't know whether Owen Powell was alive or deceased until after the report of the American Archives told us that. Since then, we simply endeavored to find whether he left issue or a will.

Q. Was any effort made to get the approval of his estate as successor to his interest?

MR. PAIGE: At what time?

MISS POWELL: At any time.

MR. PAIGE: At any time from when, Miss Powell?

MISS POWELL: From 1935 when Owen Powell died, I think it was around 1934, 1933 or 1934, that they discontinued renting the property and the use was permitted to the life beneficiaries.

THE WITNESS: It was only comparatively recently that we knew Owen Powell was deceased. We didn't know whether he was alive or deceased; the same applies to the other heirs.

BY MISS POWELL:

Q. That is true, but the point I am trying to get at is whether his estate as successor to his interest was ever notified? A. We didn't know he had an estate, we thought he was alive, we didn't know whether he was alive or deceased. Why would we contact his estate if we didn't know whether he was alive or not?

* * *

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[2] PROCEEDINGS

THE DEPUTY CLERK: Powell versus Powell, et al.

* * *

RULING

THE COURT (J. Holtzoff): The Court is of the opinion that each of the four children named in the fourth paragraph of the will took a vested remainder subject to being divested in the event that the child died prior to the death of the life tenants without issue.

And the Court will order distribution on that basis. While it is often said that no will has a twin brother, nevertheless the case of Pyne versus Pyne, 81 Appeals D. C. 11, supports the construction hereby adopted by this Court.

You may submit your order.

MR. DULANY: I only wanted to clarify whether Your Honor's ruling — I did not hear it correctly. What I want to know if I did hear it correctly. Did Your Honor say, it would be divested if the child died with issue or without issue?

THE COURT: The child died with issue.

MR. DULANY: With issue.

THE COURT: I intended to say with issue.

MR. DULANY: I thought you said without issue and then referred to the Pyne case and I was not sure.

THE COURT: I am following the construction of the Pyne case.

[3] MISS POWELL: Your Honor, does that mean that if they died with or without issue?

THE COURT: Subject to being divested if they died with issue. Now the fact is that four of them died without issue and, therefore, their remainders are vested and not divested. And, of course, their remainders will descend either to their heirs or next of kin or devisees or the legatees as the case might be.

I notice there are other matters on the Court's list in this case. Objection to the fourth report of the auditor and a motion to strike under Rule 11. What are they?

MISS POWELL: Your Honor, I believe that the other issues were in effect settled by your decision in the matter. I frankly must say that I am very — I am quite appalled that there has not been a very careful study as I asked.

THE COURT: Well now there is a motion under Rule 11 to strike the opposition of successor trustee and objections to the report of the successor trustee.

Now, of course, I am not going to strike any opposition. But, I will deny the motion under Rule 11 filed May 10, 1960.

[Filed September 21, 1960]

MOTION FOR REHEARING ON THE MOTIONS FOR SUMMARY JUDGMENT AND CONSTRUCTION OF THE WILL OF DIANA KEARNY POWELL, DECEASED

The defendant, Diana Kearny Powell, pro se, moves for rehearing on the Motions for Summary Judgment and Construction of the Will of Diana Kearny Powell, deceased, on the grounds:

1. The judgment of the Court, as pronounced in open Court, is confused and ambiguous, in effect reversing itself;

2. The judgment of the Court was rendered without consideration of the exhibits submitted by the defendant, Diana Kearny Powell, in support of her claim; over protest;

3. The judgment of the Court is without basis in the facts of the case appearing in the whole record and not contraverted;

4. The judgment of the Court is without foundation in the applicable law as pronounced in Pyne v. Pyne, 154 F.2d 299, 81 U.S. App. D.C. 11;

5. The Successor Trustee and the Estate of Lucy Powell are estopped by their prior position and conduct from opposing the rights of the defendant, Diana Kearny Powell, to the entire corpus of the Estate of Diana Kearny Powell, deceased, Adm. 12657;

6. The defendants added to this action by Order of this Court of December 21, 1959, are estopped by laches from now claiming an interest in the remainder estate under the will of Diana Kearny Powell, deceased (Administration No. 12657 in this Court) which

they have failed to assert in the course of fifty-five years of acquiescence by themselves and by their predecessors in interest;

7. The judgment as rendered shocks the conscience by lending the process of the Court sitting in an equitable proceeding to aid in the perpetration of fraud, as more fully set forth in the Cross-Claim filed in this cause by the defendant, Diana Kearny Powell, on the 21st day of December, 1959;

WHEREFORE, the defendant Diana Kearny Powell, pro se, moves this Honorable Court for rehearing of the Motions for Summary Judgment, and for Summary Judgment entitling her to the entire corpus of the Estate of Diana Kearny Powell, deceased, Administration No. 12657, with costs and allowable fees.

/s/ Diana Kearny Powell

Diana Kearny Powell, pro se, Defendant
Attorney at Law
1500 Massachusetts Avenue, N. W.
Washington 5, D. C.

[Certificate of Service]

[Filed November 8, 1960]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[1] October 3, 1960
Washington, D. C.

The above-entitled matter came on for further hearing before The HONORABLE ALEXANDER HOLTZOFF, a United States District Judge, at 10:45 A.M.

* * *

[3] THE COURT: * * *

Now, Miss Powell, I will go over your objections. How big is this estate?

MR. PAIGE: Approximately $30,000.00 in personalty, Your Honor, together with real estate in New Jersey which I am informed is valued between $15,000 and $20,000.

[4] THE COURT: It is about a $50,000.00 estate?

MR. PAIGE: Approximately.

THE COURT: About how large is the net share of each of the five remainders? Approximately?

MR. PAIGE: Well, it would be 1/5th as to each of the five remainders.

THE COURT: In other words, Miss Powell will get about $10,000.00 on one theory and much more on another theory? Is that it?

MR. PAIGE: That is correct, Your Honor.

THE COURT: Your proposed order, Miss Powell, is merely a proposed order to reach the opposite conclusion, which would reach the opposite conclusion from that which I have reached. You are not objecting to the form of the order?

MISS POWELL: May it please the Court, Mr. Dulany has filed a motion to set the case for pretrial on the cross-claim. Now the cross-claim which was filed almost a year ago charges fraud in the administration of the estate. That is very closely bound up —

THE COURT: What point are you trying to make?

MISS POWELL: What I am trying to make is I would ask that the final signing of the order should

be postponed until the settlement of the cross-claim. Otherwise it would involve these people —

THE COURT: No, I am going to dispose of the [5] matter at this time. I have heard you at length on the merits of the motion.

* * *

MISS POWELL: For the record, Your Honor, may I respectfully take exception to your ruling?

THE COURT: Very well.

[Filed October 5, 1960]

FINAL ORDER GRANTING MOTION OF NATIONAL SAVINGS AND TRUST COMPANY FOR SUMMARY JUDGMENT AND DENYING OTHER MOTIONS

This cause having come on to be heard on the motion of the National Savings and Trust Company, Successor Trustee, for summary judgment, requesting the instructions of the Court with respect to the proper distribution of the trust estate created under the will of Diana Kearny Powell, deceased, and on the motion of defendant Diana Kearny Powell for summary judgment, and upon consideration of the pleadings, exhibits and memcranda of points and authorities filed herein and of the arguments of counsel in open Court, and it appearing that there is no genuine issue as to any material fact herein, and it being the opinion of the Court that each of the five remaindermen designated in said will, namely, William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell, received a vested remainder in one-fifth of said estate subject to being divested only

by his or her death leaving descendants prior to the time of distribution set forth in said will, and accordingly that as to each of said remaindermen who died prior to the time of distribution leaving no surviving descendants his or her remainder interest was not divested and now is distributable to his or her successors in interest, therefore, it is by the Court this 5th day of October, 1960.

ORDERED, as follows:

1. That the motion of the National Savings and Trust Company, Successor Trustee, for summary judgment be, and the same hereby is granted.

2. That the motion of defendant Diana Kearny Powell for summary judgment be, and the same hereby is denied.

3. That the will of Diana Kearny Powell, deceased, is construed as providing that each of the five remaindermen designated therein, namely, William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell, received a vested remainder in one-fifth of said estate subject to being divested only by his or her death leaving descendants surviving prior to the time of distribution set forth in said will, and accordingly that as to each of said remaindermen who died prior to the time of distribution leaving no surviving descendants his or her remainder interest was not divested and now is distributable to his or her successors in interest.

4. That the National Savings and Trust Company, Successor Trustee, file its final account herein, showing distribution of said trust estate, after payment of its commissions and costs and a reasonable fee to its attorneys herein to be approved by the Court,

of one-fifth thereof to Diana Kearny Powell, surviving daughter of William Glasgow Powell, and one-fifth thereof to the successors in interest of each of the following, viz: Owen Bullitt Powell, George Cuthbert Powell, Aimee Powell and Lucy Powell.

5. That, for the purpose of making said distribution as aforesaid, said National Savings and Trust Company, Successor Trustee, be and it hereby is authorized to sell all the assets of said trust estate, both real and personal, and convert the same into cash.

AND IT IS FURTHER ORDERED that the motion and objections of defendant Diana Kearny Powell to the fourth report of the auditor, and the motion of said defendant to strike under Rule 11 be, and the same hereby are denied.

/s/ Alexander Holtzoff
JUDGE

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16071

DIANA KEARNY POWELL, Appellant

v.

NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee, et al., Appellees

Appeal from the United States District Court
for the District of Columbia

OPINION
Decided July 31, 1961

Miss Diana Kearny Powell, appellant pro se.

Mr. Henry H. Paige, with whom Messrs. Arthur P. Drury, John M. Lynham, and John E. Powell were on the brief, for appellee, National Savings and Trust Company, Successor Trustee.

Mr. Benj. W. Dulany for appellees Anne T. Ogden and Lester H. Sellers, Ancillary Executors of the Estate of Lucy Powell, deceased.

Mr. Nathan Wold entered an appearance for appellee Martha Powell Nistler and certain other appellees.

Before: Wilbur K. Miller, Chief Judge, and Prettyman and Burger, Circuit Judges.

BURGER, Circuit Judge: Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.

In 1958 the last surviving of five life tenants of the trust estate died and the appellee trustee was required to make final distribution under a residuary trust provision contained in a will executed in 1895. Under the terms of the trust one-half of the trust income was given to each of two daughters of testatrix for life or until marriage,

> and upon the marriage or death of both daughters, then fourth & finally to divide the said property absolutely and in fee, . . . equally between my children now living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may

> die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified. (Emphasis added.)

Four of the five children of the testatrix died, without issue surviving, prior to the time of distribution. Appellant is the sole surviving child of William G. Powell, the last survivor of testatrix' five children.

The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

We hold that the will discloses an intent to vest each of the five children with an equal share of the residue "absolutely and in fee," subject only to the life estates of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

In Pyne v. Pyne, 81 U.S.App.D.C. 11, 154 F.2d 297 (1946), we held that unless both conditions, death of the remainderman during the preceding life estate and survival of issue of the deceased remainderman

are met, the remainderman has a vested interest which passes by his will or by statute as the case may be. See also Scott v. Powell, 86 U.S.App.D.C. 277, 182 F.2d 75 (1950); Episcopal Eye, Ear and Throat Hospital v. Goodwin, 107 U.S.App.D.C. 375, 278 F.2d 255 (1960).

It is suggested by the dissent that this view ignores the testatrix' express intention which is articulated following the vesting clause "to divide the said property absolutely and in fee, . . . equally among my children now living . . . ." We hold simply that it would take strong and unequivocal language to negate the use of these classic words of art which have accepted meaning and fixed legal consequences. Read as Judge Prettyman reads it, the second part of the sentence is not an explanation but a repudiation of the vesting clause. It should be noted that the explanation or expression of intent which follows the vesting clause, is in turn qualified by the phrase "as hereinbefore specified" which completes the circle and takes us back to the vesting language "absolutely and in fee."

It is no help in the process of searching for intent to look to unanticipated events to prove that the testatrix could not have meant what she said by the words "absolutely and in fee." Of course she had no way of knowing in 1895 that four of her five children would die without issue. But we cannot predicate our construction of the will on what happened over the 63 years intervening between the date of the will and death of the last of five vested remaindermen. Nor can we give such weight as is urged to the "blood line" argument, for if each of her children had been survived by one child those children could have freely distributed this property outside the blood line. That

events did not develop as the testatrix probably thought they would does not give us freedom to construe her will now as we think she ought to have written it had she been able to peer 63 years into the future.

Affirmed.

PRETTYMAN, Circuit Judge, dissenting: The basic rule of the law of wills, as I understand it, is that the intention of the testator, if it can be ascertained from language in the will, governs. This means what he intended as a matter of practical reality in his own mind, in so far as his words indidate his purpose. That question is devoid of consideration of legalisms and the niceties of judicial semantic ascription.

In the case at bar the testatrix clearly stated her intention that her property was to remain in her own family, with her own descendants. In the last part of the long sentence from which the court quotes in its opinion, she wrote:

> "* * * it being my intention that [if both daughters died or married] the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified."

The purport of that emphasis upon her intention seems to me indisputable. She had in mind, and attempted to make clear, that at the time when the division was appointed to take place, i.e., when the property was rid of its incumbent trust, her property should go to her own children and their descendants, and to no one else. Since that intention is clear, that ends the matter. The property must go as intended.

The court construes the early part of the provision it quotes. It correctly applies the rules of construction. In so far as that part of the provision is concerned, and in so far as legal rules of construction are concerned, the court, I agree, is correct. The error, it seems to me, is that the court ignores the plain expression of intent in the latter part of the quoted provision. It concludes upon construction that the property should be divided into five parts and then subdivided among the legatees, assignees, or heirs at law of each of the original children. Since four of those children had no descendants, this construction means that four of the five parts go to collaterals, in-laws, or strangers; the only direct descendant of the testatrix or of any of her children gets only one-fifth. This, to my mind, is a far cry from the clear intention of the testatrix, as expressed in the simple and emphatic restatement of her intent quoted above.

This preference of a testator to keep his property in those of his own blood is a usual one. As the Court of Appeals of New York once remarked: "Of two doubtful interpretations, that favoring the blood of the testator rather than strangers will be adopted. Human nature usually so acts."[1]

The legal point I make is that a court does not apply to the language of a will rules designed to give meaning to meaningless expressions, if the court can ascertain from the will the actual intention of the testator, i.e., what the testator really meant to do with his property. Only if the actual intention of the

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[1] In re Rooker's Will, 248 N.Y. 361, 162 N.E. 283 (1928).

testator cannot be ascertained from the four corners of the will does the law undertake to assign an artificial meaning and result to the words used. Lacking knowledge of actual intent, the courts ascribe by an abstruse system of legalisms a meaning to the will and thus, by a naked fiction, an intention to the testator.

In the learned authorities, such as the Restatement,[2] the phrase "judicially ascertained intent" is used, but that term means, first, what the testator had in mind, judicially ascertained from the language of the instrument. If his actual intent is clearly to be found in the will, the court so finds, and this is the judicially ascertained intent. The Restatement says, for example, "The dominant objective of construing a conveyance is to determine the disposition which the conveyor wanted to make."[3] The use of the phrase "judicially ascertained intent" to include a plain purpose indubitably expressed in simple words seems to me to create confusion. But the real meaning of the authorities nevertheless seems to me to be clear.

The cases cited by the court, Pyne v. Pyne,[4] Scott v. Powell,[5] and Episcopal Eye, Ear and Throat Hospital v. Goodwin,[6] do not suggest a different view. In Pyne v. Pyne we carefully pointed out:

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[2] 3 PROPERTY § 241 (1940).

[3] Id., Comment c.

[4] 81 U.S. App. D.C. 11, 154 F.2d 297 (D. C. Cir. 1946).

[5] 86 U.S. App. D.C. 277, 182 F.2d 75 (D. C. Cir. 1950).

[6] 107 U.S. App. D.C. 375, 278 F.2d 255 (D.C. Cir. 1960).

> "The basic, always controlling, rule in the construction of wills is the intent of the testator. If that intent can be discerned in the language of the will, read, of course, in the light of the surrounding circumstances, there is an end to the matter."[7]

We searched that will for "indicia of intent" and then went on to say: "If these indicia of intent within the will be not conclusive, we must ascertain the meaning which the law attaches to the provision in controversy."[8] We found that the available "indicia of intent" and the law's construction of the terms were the same. In Scott v. Powell we meticulously searched the whole will and considered its "scheme", and thus ascertained an "evident intent that the property should go to the testatrix's descendants so long as there were any."[9] In Episcopal Eye, Ear and Throat Hospital v. Goodwin, the problem which arose sixty-three years after the will had been written was obviously not contemplated by the testatrix, and so we laboriously applied the law's rules of construction. All three of those cases were correctly decided, in my judgment. None of them applies to the case at bar. In this latter the actual intent of the testatrix is clear, and we should not belabor the matter. Her intention is all there is to the case.

I would reverse.

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[7] 81 U.S. App. D.C. at 14, 154 F.2d at 300.

[8] 81 U.S. App. D.C. at 15, 154 F.2d at 301.

[9] 86 U.S. App. D.C. at 283, 182 F.2d at 81.

APPENDIX B TO RESPONDENT'S BRIEF

ANALYSIS OF PATENT MISREPRESENTATIONS of the record, facts, and the case law in opinions of Judge Holtzoff and Judge Burger about which there could be no bona fide question or mistake, prepared by Diana Kearny Powell.

RULING OF JUDGE HOLTZOFF, in CA 4051-55, September 20, 1960 (A 38-39).

A 38, Lines 2-3: ". . . four children named in the fourth paragraph of the will . . ."

Misstates will: Five children are named (A 19, lines 21-24).

A 38, lines 3-4: ". . . took a vested remainder subject to being divested . . ."

Misstates will:

1. No provision is made in the will for divesting the remainder. A 19, lines 18-34.

2. The future remainder interest is given patent misinterpretation as passing present possession at time of writing the will, a patent anachronism. A 19, lines 17-19.

A 38, lines 4-6: ". . . in the event the child died prior to the death of the life tenants without issue." A 39, lines 10-16: "Subject to being divested if they died with issue. Now the fact is that four of them died without issue and, therefore, their remainders are vested and not divested. And, of course, their remainders will descend either to their heirs or next of kin or devisees or the legatees as the case might be."

Misstate the will:

1. The will specifically provides for descendants of a deceased remainderman to be substituted as remaindermen. A 19, lines 24-26, 31-34.

2. Aimee and Lucy, the trust beneficiaries, had only the income and use during life, and were not "life tenants". A 19, lines 9-17, 26-31.

3. No provision is made in the will for remaindermen dying prior to termination of the trust without issue, because the will specifically provided for the remainder in its entirety to be equally divided among a class of certain specified persons, the children of testatrix and their descendants. A 19.

4. This class was specified to be determined at the termination of the trust by marriage or death of the surviving trust beneficiary. A 19, lines 17-26, 30-35.

5. No distinction is made as to the named remaindermen dying with or without issue surviving except by substitution in the rights of the deceased parent. A 19, lines 20-26, 30-35.

Misstate the record:

1. The Complaint for appointment of a Successor Trustee, CA 4051-55, shows the legal title in the

trustee and the beneficial interest in the plaintiff, Lucy Powell, by Order of the Court. A 13-14.

2. The Complaint shows Diana Kearny Powell as vested remainderman, substituted in the rights of her deceased father, William Glasgow Powell, and includes Owen Bullitt Powell and George Cuthbert Powell only if they are in being, at that time, not known to the parties. A 12-14.

3. The report of the American Archives Association, part of the record, shows in fact that Diana Kearny Powell was the only vested remainderman in esse. A 30.

4. The record shows that by Order of the Supreme Court of the District of Columbia in Administration No. 12,657 the legal title of the estate of Diana Kearny Powell, deceased, with all the rights pertinent thereto were vested in William G. Powell as trustee, and the residue distributed to him, with written consent of all parties (A 13-15 and Adm. 12,657) and that after the death of William G. Powell, May 11, 1955, all rights vested in William G. Powell as trustee were vested in the National Savings and Trust Company as Successor Trustee, by Order of this Court entered January 5, 1956. A 23-24.

5. The Third Annual Report of the Successor Trustee shows final distribution of one-third of the remainder after termination of the trust by the death of Lucy Powell, September 1, 1958, with two-thirds retained pending finding as to whether or not Owen Bullitt Powell and George Cuthbert Powell were in esse or had, if dead, left surviving descendants, which was approved by Order of this Court entered April 15, 1959. A 25-29.

6. The Report of the American Archives Association, part of the record before the Court, confirmed

the fact that Diana Kearny Powell, substituted remainderman in the rights of William Glasgow Powell, was the only person in esse qualifying as a member of the class specified in the will to receive the remainder. A 30.

Misstates the law: See below, Pyne v. Pyne.

A 38, lines 9-11: ". . . the case of Pyne versus Pyne supports the construction hereby adopted by this Court."

Misstates the case law:

1. While purporting to follow Pyne v. Pyne, this ruling in fact holds the exact opposite, i.e., Judge Holtzoff rules that ". . . their remainders are vested and not divested. And, of course, their remainders will descend either to their heirs or next of kin or devisees or the legatees as the case may be." Pyne v. Pyne, 81 U.S. App. D.C. 11, 154 F.2d 297 (D.C. Cir. 1946), on the contrary reversed the decision of the District Court holding a vested remainder in futuro indefeasible:

> ". . . we hold that upon the death of the testatrix, each designated remainderman took a vested remainder in fee simple subject to be divested in the event of his death, . . . prior to the death of the life tenant . . .
>
> "Since John Pyne's assignment to Henry Pyne carried John Pyne's interest only, it was ineffective as against Jennifer Pyne upon the death of John Pyne prior to the death of Caroline C. F. Pyne [the life beneficiary]. As to the one-fourth of the property in which John Pyne's interest was contingent, his assignment was subject to the same limitations as his vested interest; his descendant

became a substituted remainderman when he died before the event which constituted the contingency upon which his interest depended. As the District Court held that John Pyne's interests were indefeasible, it follows that the decree must be reversed."

The fraudulent basis of the opinion appears in the record:

1. Question as to distribution of the remainder after termination of the trust was first raised by Henry H. Paige, Esq., attorney for the National Savings and Trust Company, Successor Trustee of the terminated trust, A 36, lines 23-8, and successive pleadings.

2. The stated grounds for the question were a purported vested fee absolute, effective prior to termination of thc trust, incorporated in the opinion and order. A 38-9, 43-5.

3. The National Savings and Trust Company was estopped to raise a question patently in conflict with its own title and position over a period of years. A 13, 16, 18-9, 32-8.

4. Judge Holtzoff arbitrarily rejected the pleadings bringing the fraud to his attention, A 40-5, and cross-claim against the Executors of the Estate of Lucy Powell, deceased.

5. Question as to distribution of the remainder was also raised by Benjamin W. Dulany, Esq., appearing as attorney for the Executors of the Estate of Lucy Powell, deceased, A 38-9, and in successive pleadings.

6. Benjamin Dulany represented Lucy Powell in filing the Complaint for appointment of a Successor Trustee. A 17.

7. Benjamin Dulany and the Executors of the Estate of Lucy Powell, deceased, claim an interest in conflict with the equitable rights of Lucy Powell, under the trust, A 14, lines 7-10, and successive pleadings.

8. Judge Holtzoff admits that all these matters were before him in successive proceedings. A 43-4. Tr. January 18, 1966, pp. 9-17. Nevertheless, he denies that he misstated the record, or that his opinion was in aid of fraud. He does not suggest possible error in his opinion, nor has he offered to correct error, but states that the charges in CA 207-65, Powell v. Katzenbach, are "falsehoods." Br. 9.

OPINION OF JUDGE BURGER IN APPEAL No.16,071, July 31, 1961, A 46-9.

A 47, lines 2-4: ". . . construing a testamentary trust pursuant to a petition of the trustee for instructions . . . ."

Misstates the record:

1. No question exists as to a testamentary trust, the trust having been adjudicated in Administration No. 12,657, Estate of Diana Kearny Powell, deceased, in 1905 by the Supreme Court of the District of Columbia, and reaffirmed in CA 4051-55, Lucy Powell v. Diana Kearny Powell, Owen Bullitt Powell, and George Cuthbert Powell, and administered for fifty years without question until after its termination. A 12-38.

2. No question was raised by the testamentary trustee, William Glasgow Powell, as to construction. A 14-6, 32.

3. No question was raised by the Successor

Trustee, the National Savings and Trust Company, as to the trust. A 16, 25-9, 32-8.

4. Both the testamentary and successor trustee were estopped to raise a question as to the validity of the trust, by their acceptance of the trusteeship. A 12-38.

5. No question as to the trust was raised by any other person, and respondent joined in appointment of a successor trustee. A 22-4, 32-8.

6. The only question before the Court was the distribution of the corpus of the estate to the remaindermen after the trust was terminated by the death of Lucy Powell, the last trust beneficiary. A 26, 36, lines 21-9.

A 47, lines 5-6: ". . . In 1958 the last surviving of five life tenants of the trust estate died . . ."

Misstates the will:

1. The will provides for only two beneficiaries of the trust. A 19, lines 9-17.

2. Under the will, "All the rest and residue of the estate," went to William Glasgow Powell and his heirs forever, in trust. A 18, lines 25-35.

Misstates the record:

1. The record shows that by Order of the Supreme Court of the District of Columbia in Adm. No. 12,657, the legal title of the entire corpus of the estate of Diana Kearny Powell, deceased, was granted William G. Powell as trustee. A 13, lines 15 et seq.

2. The Complaint in CA 4051-55 for Appointment of a Successor Trustee reaffirmed distribution to the trustee (A 13, lines 15 et seq.) for only two beneficiaries, A 13, lines 19-25.

3. Order of the Court entered January 5, 1956, appointed the National Savings and Trust Company as successor trustee with the rights and duties of William G. Powell, the deceased testamentary trustee. A 23-4.

4. Reports of Successor Trustee. A 25-9.

A 47, lines 12-13: "Four of the five children of the testatrix died, without issue surviving, prior to the time of distribution."

Misstates the facts of record:

1. William G. Powell died May 11, 1955, leaving surviving issue, Diana Kearny Powell. The remainder became distributable three years later on the death of Lucy Powell, September 1, 1958, survived by Diana Kearny Powell, substituted remainderman. A 30.

A 47, lines 14-5: "Appellant is the sole surviving child of William G. Powell, the last survivor of testatrix' five children."

Misstates the facts of record:

1. William G. Powell died May 11, 1955. Lucy Powell died September 1, 1958. A 30.

2. The Complaint in CA 4051-55 shows this to be a patent misstatement of fact, Lucy Powell, the last surviving child of testatrix, being the plaintiff who brought the action for appointment of the National Savings and Trust Company as Successor Trustee on the death of William G. Powell, May 11, 1955. A 12-7.

3. The Answer of Diana Kearny Powell in CA 4051-55 shows this to be patent misstatement, since the position of Diana Kearny Powell as substituted

remainderman is predicated upon the death of her father, William G. Powell, a named remainderman, prior to the death of Lucy Powell, the trust beneficiary. A 22-3.

4. The successive annual reports of the Successor Trustee, including the Third Annual Report and Order approving it show this to be patent misstatement. A 25-9.

A 47, lines 16-25: "The trustee's request for instructions recited . . ."

Misstates the will:

1. Recitations in the request for instructions by the former trustee of the terminated trust as to what its attorneys claimed the will means, were not the will. A 18, lines 21, et seq.

Misstates the record:

1. Recitations in the request for instructions by the former trustee of the terminated trust are not the record, and misstate the record which was before the Court. A 6, lines 21, et seq., A 12-29.

2. The National Savings and Trust Company was no longer trustee, the trust having terminated September 1, 1958, with the death of Lucy Powell, the trust beneficiary. A 25-6, 30.

3. Appellant Diana Kearny Powell's several motions were part of the record and speak for themselves. Appellant claimed as remainderman substituted under the will in the rights of her father, William Glasgow Powell. A 19, lines 18-34, A 30.

4. The recitations and claims of the former trustee of the terminated trust are cited as the whole record in complete disregard of pleadings supported

by documentary proof and the whole history of the case based on court orders and administration of the trust over the years, which refute the representations of the former trustee.

Misstates the law:

1. The question raised by the former trustee is patently spurious, being predicated upon (a) a sophistic misstatement of the decisions in Pyne v. Pyne, 81 U.S. App. D.C. 11, 154 F.2d 297 (1946), and Scott v. Powell, 86 U.S. App. D.C. 277, 182 F.2d 75 (1950); (b) a telescoped and incorrect statement of the will of Diana Kearny Powell, deceased; and (c) a non sequitur conclusion which it is estopped to claim because in conflict with the title vested in the trustee. B 3-5.

A 47, lines 26-8: "We hold that the will discloses an intent to vest each of the five children with an equal share of the residue 'absolutely and in fee,' . . ."

Misstates the will:

1. This is patent misstatement of the grant in the third and first part of the Fourth paragraphs of the will to William G. Powell and his heirs forever, in trust. A 18.

2. By failing to differentiate, as the will specifically does, between the residue to be distributed to the trustee at probate (A 18, lines 22-35) and the remainder to be distributed at a specified time in the future, that is, at termination of the trust (A 19, lines 17-8, 30-1) to members of a class, the children of testatrix and the descendants of a deceased child. A 19, lines 19-26, 31-4.

3. No division into separate one-fifth shares is shown in the will. A 19-26, 31-4.

4. By failing to recognize the specific statement of intent in the will. A 31-4.

Misstates the record:

1. Order of Distribution in Administration 12,657, to which written consent of each of the five children of testatrix is attached, shows distribution of the entire residue to "William G. Powell and his heirs forever," the classic words granting a fee, as trustee. A 18.

2. The Complaint and Order in CA 4051-55 appointing the National Savings and Trust Company Successor Trustee show legal title to the whole estate in the trustee. A 12-17.

3. No claim to one-fifth shares was made by any of the five children of testatrix during their life, but on the contrary, the record in Adm. 12,657 shows their consent to distribution to the trustee. A 24.

4. The successive reports of the Successor Trustee show no division into one-fifth shares prior to termination of the trust or after, until claimed on the basis of this decision. A 25-9.

5. The record shows none of the five children of testatrix to be in esse to take or hold a vested interest at termination of the trust, leaving Diana Kearny Powell, the substituted remainderman, the only remainderman in esse. A 30.

Misstates the law:

1. The decision attempts to retain for deceased persons a future interest never held in possession to be held in abeyance until at a future date it becomes distributable, to be related back to their personal estates. The law does not recognize a vested right retained by the dead. A 39, lines 10-6, A 43-5.

2. The term "fee" is not applicable to personalty.

A 47, lines 18-9: ". . . subject only to the life estates of the daughters on the terms described . . ."

Misstates the will:

1. The will makes no grant to the remaindermen prior to termination of the trust. A 19, lines 17 et seq.

2. The will makes no grant of "life estates" to the two daughters, who have only an equitable interest. A 19.

3. The will does grant legal title to the trustee until termination of the trust for the use of the two daughters. A 18-9.

Misstates the record:

1. The record shows the only residue vested in fee and subject to the equitable life interest of the two daughters were the residue vested in the trustee and successor trustee. A 12-17, 24-29.

Misstates the law:

1. A fee absolute, by its nature, cannot be subject to a life estate.

2. It misstates the law of trusts.

A 47, lines 20-1: ". . . and subject to being divested only if they predeceased the life tenants and were survived by issue."

Misstates the will:

1. No provision is made in the will for divesting the remainder, which is granted absolutely and in

fee, at termination of the preceding trust. A 19, lines 17-35.

2. No distinction is made in the will as to the named remaindermen dying with or without issue surviving except by substitution of issue in the rights of the deceased parent. A 19, lines 20-35.

3. No right is granted in the will to alienate any part of the estate prior to final distribution except in strict accordance with the terms of the will, which specifically provides that the "entire estate" is to be equally divided among members of the designated class. A 18-9.

Misstates the record:

1. It is in conflict with the successive reports of the National Savings and Trust Company as successor trustee, including the Third Annual Report, approved by court order April 15, 1959. A 25-9.

2. It sustains misrepresentations of the former trustee, contrary to the record. B 9.

Misstates the law:

1. It recognizes abeyance of seisin, contrary to law.

2. It reaches a perverse conclusion without foundation in the terms of the grant and contrary to the express terms of the grant. A 18-9, 50-2.

3. It uses sophistic reasoning, adduced from misstated premises to reach a spurious conclusion, the exact opposite of the plain provisions of the will. A 18-9, 50-2.

4. It twists the terms of the grant to sustain spurious claims barred by estoppel. A 12-29. B 5.

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4. It twists the terms of the grant to sustain spurious claims barred by estoppel. A 12-29. B 5.

5. It misstates the law of trusts.

6. It sustains patent fraud on a trust. B 5.

A 47, lines 22 et seq.: "In Pyne v. Pyne, 81 U.S. App. D.C. 11, 154 F.2d 297 (1946) we held" etc.

Misstates the law:

1. This is a patent misstatement of Pyne v. Pyne, which held:

> ". . . we hold that upon the death of the testatrix, each designated remainderman took a vested remainder in fee simple subject to be divested in the event of his death, . . . prior to the death of the life tenant . . .
>
> "Since John Pyne's assignment to Henry Pyne carried John Pyne's interest only, it was ineffective as against Jennifer Pyne upon the death of John Pyne prior to the death of Caroline C. F. Pyne [the life beneficiary]. As to the one-fourth of the property in which John Pyne's interest was contingent, his assignment was subject to the same limitations as his vested interest; his descendant became a substituted remainderman when he died before the event which constituted the contingency upon which his interest depended. As the District Court held that John Pyne's interests were indefeasible, it follows that the decree must be reversed.

2. It misstates the law of future estates, which of their nature do not commence until termination of the preceding estate, both under the common law and under the statutory definition, cited in Pyne v. Pyne D.C. Code 1940 sec. 45-812. Also Secs. 45-810, 811, 813, 814.

3. It improperly applies to personalty the law applicable only to realty.

4. It fails to differentiate between Scott v. Powell, 86 U.S. App. D.C. 277, 182 F.2d 75 (1950), in which complete failure of remaindermen left the remainder as in intestacy, in effect merging the life and remainder estates; between the Pyne case in which two named remaindermen and one substituted remainderman were in esse claiming future estate, vested and contingent; and appellant as only remainderman in esse.

A 48, lines 7 et seq.: "It is suggested by the dissent . . ." etc.

Misstates the will:

1. This whole paragraph is sophistic, dishonest reasoning, adducing spurious conclusions from misstated premises and an assumption of conflicts which do not exist in the will. A 18-9.

2. By taking the words "absolutely and in fee" out of context to reach a perverse conclusion. A 19, line 19.

Misstates the record:

1. By purporting to refute the title vested in the trustee and successor trustee by court orders. A 14-5, 23-4.

2. By ignoring administration of the trust over a period of fifty years. A 14-5, 25-9.

Misstates the law:

1. By ignoring the law of construction of wills as stated in Pyne v. Pyne. A 52, B 14.

2. By misstating the law of future interests as defined in the District of Columbia Code and the well-settled case law. D.C. Code 1951 § 45-812.

A 48, lines 24-6: ". . . to look to unanticipated events to prove that the testatrix could not have meant what she said . . ."

Misstates the will:

1. It falsely imputes a conflict of provisions in the will which does not exist. A 18-9.

2. It falsely imputes a conflict between the provisions of the will and the presumption of natural preference which does not exist. A 19.

3. The plain terms of the will did anticipate events as they did in fact happen. A 19, 30.

Misstates the record:

1. It brushes aside fifty years of administration of the trust as provided for in the will. A 12-19, 25-9.

2. It falsely imputes to appellant an effort to make claims in conflict with the provisions of the will, whereas the conflicting claims were those posed by the former trustee of the terminated trust and the executors of the estate of Lucy Powell, in conflict with the interests and title of the trustee and the trust beneficiary, Lucy Powell.

3. It falsely implies that anticipated events did not in fact materialize. A 12-9, 30.

Misstates the law:

1. By rejecting the law of interpretation of wills. A 50-2. B 14.

A 48, lines 27-9: "of course she had no way of knowing . . ." etc.

Misstates the will and the record as noted in the preceding analysis.

A 48, lines 29-31: "But we cannot predicate our construction of the will on what happened over the 63 years intervening . . ."

Misstates the will:

1. The will specifically provides for title in the trustee and administration of the trust until termination of the trust. A 18-19.

2. The will specifically provides that the remainder estate is limited to take effect upon termination of the trust by marriage or death of both life beneficiaries. A 19, lines 17-9, 32-5.

Misstates the record:

1. It refuses recognition to fifty years of administration of the trust, from probate of testatrix's will in 1905 until termination by the death of Lucy Powell, the trust beneficiary in 1958, consented to by all parties and judicially recognized by the Court in Administration 12,657 and CA 4051-55, the preceding estate upon which the remainder is limited to take effect. A 12-29.

Misstates the law:

1. It misstates the well-settled law that a future estate must be limited to take effect immediately upon the termination of a preceding particular estate.

2. It misstates the well-settled law that a will takes effect, not from the date it is made, but from the time of death of the testatrix.

A 48, lines 31-2: ". . . between the date of the will and death of the last of five vested remaindermen."

Misstates the will:

1. The will plainly limits the remainder to take effect upon termination of the trust. A 19.

2. The will patently does not and could not grant any estate prior to death of testatrix and probate. A 17-9.

3. The will plainly provides the remainder estate is to take effect on the marriage or death of two life beneficiaries, the fact that the life beneficiaries were also named remaindermen being irrelevant in view of the provision for the substitution of the descendants of a deceased remainderman prior to termination of the trust. A 19, lines 17-34.

4. Two, not five, life beneficiaries are named in the will. A 19, lines 9-17.

5. The death of Lucy Powell terminated the trust, not because she was the last named remainderman, but because she was the last trust beneficiary. A 19.

Misstates the facts of record:

1. Diana Kearny Powell is the last vested remainderman, being substituted in the rights of her father William G. Powell, and is still surviving, and therefore it is a misstatement of fact to refer to the death of Lucy Powell in 1958 as the death of the last remainderman. A 19, 30.

2. The Reports of the Trustee, including the Third Annual Report of the Successor Trustee, approved by Order of the Court April 15, 1959, show Diana Kearny Powell as only vested remainderman in esse. A 25-9.

Misstates the will:

1. Confuses the status of trust beneficiary and remainderman.

A 48, lines 33-4: "Nor can we give such weight as is urged to the 'blood line' argument . . ."

Misstates the will:

1. This statement falsely insinuates a conflict between the will and the presumption that a testator will prefer his own blood, whereas the will plainly and in unmistakable language exactly coincides with the presumption. A 19.

A 48, lines 34-5: ". . . for if each of her children had been survived by one child. . ."

Misstates the will:

1. This is a patent anachronism, implying a non-existent provision in the will, since the will provides for substitution of a descendant of a deceased child prior to the termination of the trust by marriage or death unmarried of the two trust beneficiaries, Aimee and Lucy. A 19.

Misstates the record:

1. The phrase represents pure speculation as to non-existent facts, which, if they had occurred, would have accelerated distribution to the named remaindermen prior to death. A 30.

A 48, lines 35-6: ". . . those children could have freely distributed this property outside the blood line."

Misstates the will:

1. This imputes to substituted remaindermen powers, not granted in the will to the named remaindermen, to alienate, in contravention of the grant in the will, trust property prior to termination of the trust. A 19.

Misstates the record:

1. This imputes to substituted remaindermen powers never claimed or exercised by either named remaindermen or the substituted remainderman to dispose of the future estate prior to termination of the trust. A 12-29.

Misstates the law:

1. It confuses the remainder in futuro before termination of the trust with the present right of possession and control in the vested remainderman after termination of the trust. B 14.

A 49, lines 1-5: "That events did not develop as the testatrix probably thought they would does not give us freedom to construe her will now . . ."

Misstates the will:

1. This statement ignores the plain provision in the will for events as they did in fact develop. A 18-9, 30.

2. By sophistic reasoning, this statement implies that the writer is reluctantly following the will, whereas from beginning to end, the opinion has given a patently perverse construction both in detail and in general tenor.

3. This is a deliberate and calculated attempt to mislead and render a perverse construction of an expertly drafted will. A 17-9.

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,181

DIANA KEARNY POWELL,

Appellant,

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Appellee.

Appeal from a Final Order of the United States
District Court for the District of Columbia

DIANA KEARNY POWELL, *pro se*
1500 Massachusetts Avenue, N. W.
Washington, D. C. 20005

QUESTIONS PRESENTED

The questions presented on appeal are whether an attorney disbarred for alleged professional misconduct for statements imputing corruption to two United States Judges incorporated in a complaint addressed to the Attorney General seeking criminal action against a bank, two lawyers, and the two judges for repeated knowing misstatements of the facts, the record and the law to aid fraud

1. Has been denied a fair trial by an impartial tribunal in violation of the Constitution of the United States by reason of prejudice of the hearing judges in favor of colleagues on the same and higher courts accused of misconduct in office.

2. Has been denied the right of free speech and the right to petition the Government for redress of grievances.

3. Has been deprived of due process under Amendments 5 and 6 of the Constitution of the United States by arbitrary exclusion from consideration of matters of record and denial of the right of cross-examination of witnesses, the charge of misconduct, although civil in nature, carrying the implication of perjury, a felony involving moral turpitude.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction under the Act of October 31, 1951, c. 655, Sec. 48, 50(a), 65 Stat. 726, 727, 28 U.S.C.A. 1291, 1294, providing for appeal of right from final judgments of the United States District Court for the District of Columbia. Jurisdiction in the Court

below was under Rule 94 of the Local Rules. Jurisdiction is also invoked under the Constitution of the United States, Amendment 1, and Amendments 5 and 6.

Appeal is taken from a final Order of the United States District Court for the District of Columbia, entered April 7, 1966, ordering Appellant disbarred from the practice of law in the District of Columbia. (J.A. 10).

STATEMENT OF THE CASE

Appeal is taken from a final Order of the United States District Court, entered April 7, 1966, disbarring Appellant from the practice of law in the District of Columbia. (J.A. 10).

Appellant filed a Complaint in the nature of mandamus naming the Attorney General as defendant seeking criminal action for fraud and embezzlement committed by a national bank, two lawyers, and aided and abetted by two United States judges who misstated the facts, the record, and the law to support the patently false claims of the bank. (Supp. A. A-6).

The United States Attorney's office referred the Complaint to the Committee on Admissions and Grievances, representing the two paragraphs alleging corruption on the part of the two judges was absolutely without foundation in fact. After notice and hearing before the Committee, Appellant-Respondent having filed a 34-page Answer to the letter of complaint in which she gave numerous quotations from the record supporting her allegations as well as citing the Canons of Professional Ethics and the case law showing it to be her duty to make the complaint under the circumstances, formal charges of misconduct were filed against Appellant-Respondent. (Supp. A. A-1). Motion to Dismiss was filed (Supp. A. A-9) and denied, and an Answer timely filed (Supp. A. A-10).

The case came on for trial January 18, 1966, before Judges Keech, Youngdahl and Walsh. The Committee called as witness Judges Holtzoff, Burger, Miller and Prettyman, each of whom testified that the statements

regarding corruption by the two judges were false. (Tr. 9-11, 20 *et seq.*, 42-4, 52-4 and Supp. A. 2, 9-11). Appellant-Respondent was denied, over objection, adequate opportunity to test the credibility and recollection on cross-examination, or to adduce the testimony of eight of the ten witnesses called by her on the ground that the matters to which they would testify were all of record, and judicially noticed by the Court. The case was rested with the stipulation that the parties would file supporting trial briefs. Appellant-Respondent's trial brief is made part of the record as Supplemental Appendix, consisting of the brief, giving summary of facts and argument and supporting cases and authorities, and cross-referenced with Appendix A setting forth relevant pleadings and portions of related cases judicially noticed by the Court, and with Appendix B, showing detailed analysis of the Complaint against the two judges, also cross-referenced with the record in Appendix A. The Committee filed an answering brief.

The Court filed a Memorandum March 18, 1966, finding Appellant-Respondent guilty of professional misconduct. Appellant-Respondent filed a timely Motion to Set Aside the Finding of Guilty and to Enter a Judgment of Not Guilty (J.A. 1), which was denied, and an Order of Disbarment (J.A. 10) with Finding of Facts that Appellant-Respondent's statements were without foundation in fact, entered April 7, 1966, (J.A. 8) from which this appeal is taken, Notice of Appeal filed April 11, 1966. (J.A. 11).

CONSTITUTIONAL AMENDMENTS AND RULES

Constitution of the United States, Amendment I:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Local Rules, United States District Court for the District of Columbia

Rule 94. Disbarment; suspension; censure:

. . . (g) Charges, Trial of; Punishment; Injunction. . . .

STATEMENT OF POINTS

1. The finding of fact and judgment is contrary to the evidence, as more fully described in Respondent's Motion to Set Aside Finding of Guilty.

2. In curtailing, over objection, cross-examination of the Committee's witnesses, Judge Holtzoff (Tr. 11-19); Judge Burger (Tr. 22-41); Judge Prettyman (Tr. 44-51); and Judge Miller (Tr. 54-56).

3. In excluding, over objection, witnesses called by Respondent, as set forth in Motion to Set Aside Finding of Guilty.

4. In entering Judgment upon testimony shown to be perjured. (Tr. 11 and Appendix A-41-45, B-1-6; Tr. 21, 35 and Appendix A-45-49, B-6-20, with cross-references).

5. In failure to recognize that Respondent has continued to act in conformity with the highest standards of ethics as an officer of the Court in reporting false statements and fraud, and that the proper administration of justice imposes upon her the compelling duty to act as she has done in reporting misconduct.

6. The Order of Disbarment exceeds the jurisdiction of the Court.

7. By disbarment for true statements incorporated in a pleading addressed to a proper authority, the right of the people to petition the Government for a redress of grievances under Amendment 1 of the Constitution of the United States has been violated.

8. The Order of Disbarment violates Amendment 5 of the Constitution of the United States guaranteeing to each person due process of law and the equal protection of the law, also guaranteed in Amendments 9 and 14, by penalizing Respondent for exercising valid rights.

9. Respondent has been deprived of a fair trial by an impartial tribunal, since no judge of the United States District Court for the District of Columbia or of the United States Court of Appeals for the District of Columbia Circuit can be considered disinterested in considering the truth or falsity of charges of corruption made by the respondent against their friends and colleagues who are members of the same Court.

SUMMARY OF ARGUMENT

I.

Trial Brief adopted on appeal (Supp. A.).

II.

Appellant has been denied a fair trial by an impartial tribunal on the question of her disbarment because it was predicated upon false and perjured testimony in plain conflict with facts of record, cross-examination for purposes of impeachment and to test recollection being improperly restricted. Defense material, both testimony and evidence, was improperly excluded, or, where admitted, completely disregarded.

Both at the Committee hearing and before the Court, the hearing tribunal was biased and precommitted.

III.

Appellant has been denied the right to free speech and the right to petition the Government for redress of grievances by arbitrary refusal to consider her complaint and by blackmail in the form of an unfounded complaint to the Grievance Committee.

IV.

The charges of misconduct, although civil in nature, in fact infer perjury, a felony involving moral turpitude, not substantiated by the record. Appellant has been denied constitutional protections from such a charge.

ARGUMENT

I.

TRIAL BRIEF ADOPTED ON APPEAL

Appellant adopts the trial brief, including argument showing basis for inference of intent in the record of repeated reaffirmation of patent error, the relevant parts of record (Supp. A. A); and the analysis of the patent misstatements. (Supp. A-B).

II.

APPELLANT HAS BEEN DENIED A FAIR TRIAL BY AN IMPARTIAL TRIBUNAL ON THE QUESTION OF HER DISBARMENT

First, against appellant, who relied upon the unimpeached and judicially recognized records of the Court, were called as witnesses the two judges, charged by appellant with corruption, whose own

careers were at stake. It is pointed out that two possible avoidances of testifying were available, judicial privilege claimed by Judge Holtzoff for part but not all of the questions posed, and the Fifth Amendment as to incriminating testimony. Two other judges who had participated also testified. All four testified as to conclusions rather than facts, in broad, general statements, that the complaint of corruption was false, but appellant was denied opportunity to test their recollection and truthfulness by cross-examination, relating the false pronouncements with the facts of record. Their testimony, therefore, consisted of unsubstantiated conclusions.

Of the four judges testifying, the first, Judge Holtzoff, was a senior colleague of the three hearing the case, the other three sat in the appellate court which regularly reviewed the rulings of the three judges hearing the testimony. All four regularly passed upon cases brought or defended in their private practice by the three members of the Committee who in the quasi-judicial preliminary hearing heard the charges against appellant and determined whether to prosecute. The senior member, Edmund L. Jones, Esq., was and is counsel in an administrative proceeding in which appellant appears in opposition. (U. S. Appeals, 20202).

It therefore is clear that both the Committee and the trial court were under pressure to disregard the record supporting appellant, and to reach their decisions solely upon the testimony of the judges. This testimony, although dealing with conclusions rather than facts, is revealing.

Judge Holtzoff, although declining to answer any question of fact, vindictively went beyond the question asked,to accuse appellant of deliberate misstatement. (Supp. Br. 9, Tr. 10-11). Judge Burger evaded the fact by stating that the court did not consider the record relevant or important. (Supp. Br. 11, Tr. 31-2).

Nevertheless, the record is material, since proof of the truth or falsity of Appellant's accusation is to be found in the record, and were before the Court in Appellant's trial brief, with its Appendices A and B. (Supp. A.) Also were listed related proceedings in which the two judges repeatedly affirmed their earlier misstatements.

It is to be borne in mind that Appellant's Complaint (Supp. A. A-6) was directed primarily at the bank and the attorneys who originated the misstatements and pressed their adoption. The inclusion of the two judges was made necessary by the reliance of the guilty parties in consummating their fraud on the decisions as res judicata.

Correction of the misstatements on the ground of mistake could easily have been made early in the proceedings when this was brought before the Court. The bank and the attorneys chose to disregard their duty of candor to the Court and press their fraudulent claims. While judges rightfully are reluctant to review decisions of other judges of the same or higher courts, considerations of fundamental justice and the integrity of the court should be the primary concern where mistake and fraud are patent in the record. Where the matter comes back to the judge who rendered the decision, a positive duty exists to correct fraud and error. Candor and the duty to correct misstake of fact and law are the right and duty of both the Court and lawyers, and even litigants, as well as to expose chicanery and deceit. Canons of Professional Ethics, Preamble, 1, 15, 22, Supp. A. 5-6. Failure to act where deliberate fraud is patent could very well have made Appellant liable for Misprision of a felony, Title 18 sec. 4; or party to the conspiracy to defraud the United States by obstructing justice, 18 U.S.C. 371, 1001; *United States v. Manton, et al.*, (2nd Cir.) 107 F. 2d 834; *United States v. Downing*, (2nd Cir.) 51 F. 2d 1030. *Braatelien v. United States*, 147 F. 2d 888.

7 *C.J.S.* "Attorney and Client", states:

> "The relation of the court and its attorneys to the people is one of high responsibility, involving complete trust and confidence and absolute fidelity and integrity. . . . To warrant the removal, however, the attorney's character must be bad in such respects as to show that he is unsafe and unfit, to be trusted with the powers of an attorney."

It further states:

> "The office of an attorney is not, like ordinary public offices, subject to the will of the body creating it and burdened with whatever conditions that body may impose, but is held during good behavior, and is one of which he can be divested only upon good cause, shown and after proper judicial proceedings. *In re Clifton,* 155 So. 324 and cited cases.

Corpus Juris further states that the power to disbar is not an arbitrary one:

> The power is not an arbitrary and despotic one to be exercised at the pleasure of the court or because of passion, prejudice, or personal hostility. It is rather one to be used with moderation and caution, in the exercise of a sound judicial discretion, *United States v. Hertz,* (C.C.A. Minn.) 18 F. 2d 52, and only in a clear case for the most weighty reasons, and upon clear legal proof.

7 *Am. Jur.* 2d "Attorneys at Law" defines grounds for disbarment and limitations of the power similarly:

> Sec. 13 — Purpose of Proceeding.
>
> The purpose of suspending or disbarring an attorney is to remove from the profession a person whose misconduct has proved him unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney and thus to protect the public and those charged with the administration of justice, rather than to punish the attorney. *Ex parte Wall,* 107 U.S. 265, 27 L. Ed. 522, 2 S. Ct. 569, and cited cases.

It further limits the power:

> ". . .Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. To disbar it should be clear that he is one who should never be at the bar; . . . the consequences of disbarment are so severe, both in degrading an attorney in the eyes of the community and in depriving him of his means of livelihood, that it should be ordered only when the misconduct of the attorney may properly be characterized as gross. . . . Further, it is said that an attorney should be disbarred or suspended only where his continuance in practice will be subversive of the proper administration of justice, or incompatible with a proper respect of the court for itself or a proper regard for the integrity of the profession. *Ex parte Wall, supra.*

American Jurisprudence continues:

> ". . . In no case has it been considered that the power to disbar is an arbitrary or despotic one to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility. A sound judicial discretion controls the exercise of the power so that the right and independence of the bar will be scrupulously guarded and maintained by the court, to the same extent as it maintains the rights and dignity of the court itself. *Ex parte Bradley*, 7 Wall (U.S.) 364, 19 L. Ed. 214.

It continues:

> "It has been said that disbarment should be imposed only for misconduct that may properly be characterized as gross, and that disbarment is required only where an attorney has acted with a bad or fraudulent motive. *State v. Finley*, 30 Fla. 325, 11 So. 674.

Appellant has on the plain uncontradicted facts done nothing to render her unfit to practice law. The persons about whom she made complaint have been proved guilty of unprofessional conduct prejudicial to the proper administration of justice, by the proven facts of record. These facts were before the Committee and before the Court. (Supp. A.) The fact of the patent misstatement by the judges was a matter of record. The deliberate intent was to be inferred from the reaffirmation after the error had been brought to the attention of all involved, not once or twice, but numerous times.

The Finding of Fact of the Court finds no facts at all. It completely omits reference to Appellant's trial brief and the facts of record contained therein, and concludes, without supporting facts or evidence, that Appellant's Complaint was without foundation. (J.A. 8).

If the unspoken supposition is that proof of bribery or passing of money is necessary to support Appellant's complaint of corruption, this is not supported by the case law. Appellant, without Government assistance, would have no means of proving bribery, if it exists, and this assistance was denied her. Nevertheless, bribery is not an essential element of the misconduct which Appellant charges against the bank, the lawyers, and the two judges. This was affirmed in *United States v. Manton,* 107 F. 2d 834, 839 (C.A. 2), certiorari denied 309 U.S. 664, quoted in *Glasser v. United States,* 315 U.S. 60, and reasserted by the Solicitor General as recently as April, 1966 in *Raymond Dennis, et al. v. United States,* 302 F. 2d 5, 160 F. Supp. 787, 346 F. 2d 10, ____ U.S. ____ (No. 502 in the Supreme Court of the United States), as follows:

> The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to . . . defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.

See also *Lutwak v. United States*, 344 U.S. 604, 610-613.

In the now pending *Dennis* case, the Solicitor General further cited the Supreme Court's definition of the offense of conspiracy to defraud the United States in *Hammerschmidt v. United States*, 265 U.S. 182, 188, as follows:

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but *it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery,* or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but *only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.* . . . [Emphasis added]

Appellant submits that the acts proven by the record fall squarely within the above-cited definition of fraud on the United States under 18 U.S.C. 371 and 1001, and fully justify her complaint.

This is clearly distinct from *Duke v. Committee on Grievances*, 82 F. 2d 890, cer. den. 56 S. Ct. 751, cited by the Committee, in which the attorney charged failed to produce supporting evidence for his claims and failed to appear to answer charges.

It is pointed out that the crux of the question is whether or not the complaint is true or false, founded in fact or not.

In the instant case, the Committee and the Court have failed to show in any particular that any single particular allegation or point presented by Appellant as proof of the truth of her complaint was in any way false, unfounded, or irrelevant. In the Appendix to the trial brief she cited and explained numerous misstatements from the record, false statements of the facts, the record and the law from the exact wording of the judges themselves, as supporting their decisions, which plainly could not have been reached on the true facts, record and cited case law, also presented in contrast in the trial brief.

To reach the decision of unprofessional conduct detrimental to the administration of justice, it is clear that the action of the Court was predicated upon bias and in contradiction to the record. The judges admitted that they had participated in the proceedings at various stages.

III.

APPELLANT HAS BEEN DENIED THE RIGHT TO FREE SPEECH AND TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES

Appellant has been denied the right to free speech and the right to petition the Government for protection against fraud and the unlawful taking of her property. She has been denied this right by means of blackmail and threats to deprive her of the right to practice her profession. (J.A. 10). The charges against her deny the foundation in fact of her complaint (J.A. 8), notwithstanding the patent evidence that her complaint is overwhelmingly supported by the evidence of record. (Supp. A.). Appellant submits that the charges of unprofessional conduct for what she has a right and duty to do, that is, to make complaint to the proper authorities for fraud on the Court and perversion of justice by deliberate misrepresentation (Br. 2, Supp. A - 6 and cited articles of Canons of Professional Ethics), is in fact blackmail and extortion in disguise to threaten and punish her for exercising the right of free speech and to petition the government for the redress of grievances guaranteed by Amendment I of the Constitution of the United States. (Br. 3).

The right of petition is not limited to petitions made in assembly, for to do so would be to accord protection to mob action denied to an individual, and to deny the individual equal protection of the laws.

The right of free speech has been accorded to known subversives and agitators. *Stromberg v. California,* 283 U.S. 359, 75 L. Ed. 1117, 73 A.L.R. 1484, and cited cases. The cases are legion upholding the right, and have been enlarged rather than restricted by current decisions, too numerous to cite.

If a judge may be held responsible for crime and corruption as upheld in *Braatelien v. United States* (1945) 147 F. 2d 888, and *United States v. Manton*, 107 F. 2d 834 (C.A. 2), cer. den. 309 U.S. 664, logic, the proper administration of justice requires that an attorney bringing the facts of the crime before the proper authority be protected by the Constitutional rights guaranteed to every individual to take appropriate action. As noted earlier, failure to act might well subject Appellant to charges of misprision of a felony. 18 U.S. C. 4.

The instant case is closely analogous to *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. R. 625 (1931) involving a civil action suppressing publication of a newspaper for publishing charges against public officers of corruption, malfeasance in office, and serious neglect of duty, on the ground such publications were scandalous and defamatory. Appellant cites Chief Justice Hughes:

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter — in particular that the matter consists of charges against public officers of official dereliction — and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

Appellant points out that the gist of the opinion is the fact of censorship. She differentiates the instant case in that substantial uncontroverted proof of foundation in fact and good faith and intent on the part of Appellant were presented before the Court and totally excluded from consideration and their existence in the record denied. (Supp. A., J.A. 8-11). If censorship of matters of questionable veracity is prohibited, much more dangerous, Appellant submits, is censorship

of a legal pleading, supported by proof of its foundation in truth, petitioning a branch of the government for redress of wrongs suffered as a result of criminal misconduct and corruption of its judicial officers.

Continuing in the same opinion, the court stated:

> The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, *crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect,* emphasize the primary need of a vigilant and courageous press, especially in great cities. . . . [Emphasis added]

Appellant submits that the freedom of the attorney in exercising the right and duty (Supp. A-6) to use proper means to bring before the authorities instances of corruption in the Court itself is protected by the First Amendment and for the same weighty reasons, as guarantee immunity to the press.

IV.

APPELLANT HAS BEEN FOUND GUILTY OF CONDUCT AMOUNTING TO A FELONY INVOLVING MORAL TURPITUDE WITHOUT BEING AFFORDED CONSTITUTIONAL RIGHTS

Appellant need not go into the rights surrounding a criminal charged with serious crime, including the presumption of innocence. She submits that the charges of the Committee and the Finding of Fact of the Court that her sworn Complaint was without foundation in fact

amounts to a charge of perjury, and criminal corruption of justice, felonies involving moral turpitude, for which she might very well be criminally liable. The Rule under which the charges were brought implies criminal liability in the use of the term "punishment." (Br. 4). Notwithstanding the civil nature of the proceedings, disbarment is in every way far more serious and damaging punishment than most criminal sentences, even for serious crimes. In the instant case, it was predicated upon charges which in every way amounted to and involved the moral turpitude of a serious felony.

Appellant has defended hundreds of criminal cases and is keenly aware of the danger of perjury by both prosecution and defense witnesses. Never has she seen a court so completely biased that it accepted, as in the instant case, as sole proof of guilt the self-serving testimony of conclusions unsupported by a single fact, by witnesses so implicated that their testimony amounted to no more than pleas of "Not Guilty." Against this, plain proof, admitted and judicially noticed, (Supp. A.) far exceeding what was necessary to meet the *prima facie* case of the Committee, was completely rejected and its very existence denied in the Findings of Fact. (J.A. 8).

Appellant has been subjected to this arbitrary and despotic action finding her guilty of moral turpitude in complete contradiction to the evidence, not because she has committed any crime, but because she sought the protection of the Attorney General against crime and corruption. She submits that she was denied due process of law and a fair trial.

CONCLUSION

WHEREFORE, Appellant respectfully prays that the Order of Disbarment be reversed.

Respectfully submitted,

DIANA KEARNY POWELL, *pro se*
1500 Massachusetts Ave., N. W.
Washington, D. C. 20005
Appellant

INDEX

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of a Complaint against DIANA KEARNY POWELL, a member of the Bar of the United States District Court for the District of Columbia	)	Miscellaneous No. 54-65

RESPONDENT's Trial Brief and Appendix, In Re Diana Kearny Powell, Miscellaneous No. 54-65 in the United States District Court for the District of Columbia, submitted as a separate Appendix because of its bulk, contains the Complaint (A-1); Answer (A-10); relevant portions of related cases judicially noticed and admitted into evidence; Respondent's Analysis of Patent Misrepresentations submitted for consideration of the Court below (Appendix B); as well as relevant parts of the Canons of Professional Ethics (5-6), and excerpts from the transcript of proceedings, January 18, 1966.

[Filed March 28, 1966]

MOTION TO SET ASIDE FINDING OF GUILTY AND TO ENTER A JUDGMENT OF NOT GUILTY

Comes now Respondent Diana Kearny Powell and respectfully moves this Honorable Court to set aside the findings of "guilty" and to enter a judgment of "not guilty", and as grounds therefor shows:

1. The finding is contrary to the evidence: that is, Respondent conclusively established factual basis in the record for her complaint of misconduct against two judges as follows:

Respondent's Brief (B 1-6) conclusively shows by detailed cross-reference between the false statements and the facts of record and the cases cited that Judge Holtzoff aided fraud by the former trustee by misstatements of the will of Diana Kearny Powell in 8 particulars, of the record and evidence in Civil Action 4051-55 and the Administration 12,657 in 6 particulars, misstated the case law, and condoned patent fraud in at least 7 particulars.

Respondent's Brief (B6-20) conclusively shows by detailed cross-reference between the false statements and the facts of record and the cases cited that Judge Burger aided fraud by the former trustee by misstatements of the will of Diana Kearny Powell in approximately 35 particulars, of the record and evidence in approximately 40 particulars, and of the case law in approximately 21 particulars.

Reference was made to pleadings and the record to show misappropriation of vested property (the remainder estate) by the former trustee in reliance upon the judgments analyzed, knowing them to be based upon misstatements.

2. The Honorable Court erred in curtailing, over timely objection, cross-examination of the Committee's witnesses:

Judge Holtzoff, (Tr. 11-19)
Judge Burger (Tr. 22-41)
Judge Prettyman (Tr. 44-51)
Judge Miller (Tr. 54-56)

3. The Honorable Court erred in excluding, over objection, witnesses called by Respondent to elucidate factual foundation for her complaint and to show mala fides, including Judge Holtzoff, Judge Burger, John E. Powell, Henry H. Paige, Benjamin W. Dulany, J. Fontaine Hall, V. P. of the National Savings and Trust Company, and a trust officer of the same bank.

4. Respondent demurs to that portion of the Memorandum of the Court, third paragraph, which reads as follows:

> "...Before, and at, said hearing the Court accorded respondent an opportunity to get counsel. It was deemed advisable that she do so, inasmuch as the action from which these charges originated related to property in which respondent was personally interested."

5. Respondent alleges prejudicial error that the case had been decided on the basis of her appearance pro se, and not on the evidence, and further alleges that the Court has arbitrarily excluded all evidence, although relevant, pertinent, and admitted, from its consideration solely because introduced by her pro se, and in support of her defense. Respondent is entitled to select her own counsel, without fear of reprisal by the Court or opponents, which for good and sufficient reasons more fully set forth in the attached memorandum, is herself.

6. The original complaint against Respondent was instigated for purposes of political and personal advantage, and not to do justice, as more fully set forth in the attached memorandum.

WHEREFORE, Respondent prays that the finding of "guilty" be set aside, and a judgment of "not guilty" entered.

/s/ Diana Kearny Powell
Respondent pro se
1500 Massachusetts Ave., N.W.
Washington, D. C. 20005

Attorney at law

[Filed March 28, 1966]

MEMORANDUM OF POINTS AND AUTHORITIES, -
MOTION TO SET ASIDE FINDING OF GUILTY
AND TO ENTER A JUDGMENT OF NOT GUILTY

1, 2, and 3. Grounds 1, 2, and 3 are specific errors noted as part of the remaining grounds to set aside the finding, and speak for themselves

as depriving Respondent of a fair hearing, in violation of her rights under One and Five Amendment of the Constitution of the United States.

4. Grounds 4 is stated as proving nothing on the merits of the case. The prejudicial nature of the phrase quoted is set forth in ground 5.

5. The fact that Respondent has appeared in her own behalf is the only specific grounds stated in the Memorandum of the Court as basis for its decision. Further than that, the Court merely excludes questioning and takes judicial notice of its records (tr. 14-et seq.) It makes no statement or explanation why the specific extensive analysis of the matter set forth in Respondent's Brief is completely ignored other than that Respondent has appeared for herself in this and previous proceedings. The phrase insinuates impropriety and improper motives in Respondent's self-representation, which Respondent emphatically denies.

Whether Respondent appears pro se or by counsel should have no effect upon consideration of the merits of this case or previous cases. Respondent submits that she is bound by and at all times has observed the same standards of professional propriety and ethics whether appearin pro se or for a client, the pertinent canonsbeing shown in her Brief, p. 5-6.

Every lawyer is bound to give adequate representation to a client. Every lawyer to some extent has a personal interest in his client's case in fees and in professional standing. This is particularly true in the case of wealthy, prestige clients with extensive, continuing litigation, such as the trustee bank. (See Ground 6, below). Lawyers frequently appear pro se as executors, trustees, and in similar capacities, and are appointed to such offices with a view of their special qualifications and services.

Respondent submits that the emphasis placed upon her appearance pro se indicates that the series of adverse decisions which completely disregard the facts and the record have been rendered, not upon the basis of the facts and law before the Court, but on personal prejudice and bias.

Respondent, after careful thought, decided for good and sufficient reasons to appear pro se.

One of the foremost reasons that presents itself to Respondent for personally conducting the litigation is that the background to be investigated by new counsel appearing in the case is so extensive that it would be out of proportion to a reasonable fee percentagewise to the relatively small estate. Top rate counsel contacted have refused because of association with the trustee bank and conflict of interest. Also, counsel anticipating a small fee or no fee for extended litigation are under strong pressure to, and more often than not, do, compromise the interest of a client who can offer neither prestige nor profit. This is a truism, however unpalatable, to be reckoned with.

It is also pointed out that counsel, in order to give adequate representation in the instant case, would be exposing themselves to similar charges, and in consequence, would be under almost overwhelming pressure to concede to the blackmail of extended losing litigation and threats of loss of favor with the Court.

Respondent submits that pressure to force her to accept the advice of counsel against her better judgment on a matter in which counsel would have to weigh her interests against his own time and could not possibly acquire in a limited time her knowledge of the case, is a subtle form of blackmail to force her into a compromise that would result in condoning a most vicious fraud which it is her duty to oppose and expose.

6. Ground 6 alleges that political and personal motives have clouded the true issues. In Ground 5, Respondent pointed out that counsel are personally interested and under pressure in the representation of cases, particularly in representing wealthy, prestige clients. There is constant pressure to outdo rival law firms to retain prestige clients. She points out that Mr. Dulany's father was a director

of the trustee bank, and she suspects law firm rivalry had much to do with the presentation of the spurious claims, in C. A. 4051-55 and related cases. But she submits that every lawyer is bound to be candid with the Court and avoid any chicanery or deception, regardless of pressures and influence from his client. She also submits that she is entitled to expect candor from opposing counsel, and that the fact that she is herself learned in the law does not entitle opposing counsel to engage in unethical practices in dealing with her or for the Court to condone such misconduct. The patent dishonesty of the claims presented by opposing counsel in C. A. 4051-55 need not be enumerated. They are so clear that they could not deceive any one except by complete disregard of the plain fact that the title to the trust estate was in the trustee, not the remaindermen, until termination of the trust.

Respondent points out that the National Savings and Trust Company has claimed nearly half the trust estate as compensation for its services and attorneys' fees for promoting the spurious claims, and most of the rest for distribution to its agents. Having become deeply involved in misconduct which would, if exposed, be incriminating, they are under pressure to conceal their own guilt by lodging a complaint against Respondent to blackmail her into accepting the advice and services of counsel who could be persuaded to rationalize condoning fraud on the theory that it would be financially easier for Respondent to compromise, thereby strengthening the wholly untenable position of the bank in presenting a conflicting claim against its own position by making it appear that counsel for Respondent favored compromise. Respondent does not admit that the trustee or the Court is entitled to penalize her for exposing chicanery, nor does she intend to walk into the trap of accepting counsel whose only purpose would be to compromise her rights to protect those who are guilty of fraud.

In addition to these considerations, Respondent briefly notes that political pressures are involved. Without identifying any political party

(Respondent wishes to avoid making this a political issue), and pointing out that persons identified with both parties are involved in her Complaint in Civil Action 207-65, Respondent brings to the attention of the Court a matter not previously mentioned, that the letter of complaint to the Committee was signed by three Assistant United States Attorneys, one of whom was the son of a certain lady who was the precinct leader for her party, and who at the polls in the November, 1964 elections involved herself in a controversy with Respondent, representing the other political party, threatening retaliation through her son in the United States Attorney's office. That evening, as Respondent attempted to approach her very busy political leader to discuss what had happened at the polls, she was seen by thousands on television. At this point, Respondent is purposely not identifying either the Parties or the parties, to avoid making a political issue.

/s/ Diana Kearny Powell
Diana Kearny Powell, Respondent pro se
1500 Massachusetts Ave., N. W.
Washington, D. C.

[Filed April 7, 1966]

ORDER DENYING MOTION TO SET ASIDE FINDING OF GUILTY AND TO ENTER A JUDGMENT OF NOT GUILTY

Upon consideration of the respondent's Motion to Set Aside Finding of Guilty and to enter a Judgment of Not Guilty, the Points and Authorities in support thereof, the Memorandum of the Committee on Admissions and Grievances in response thereto, and for good cause shown, it is by the Court this 7th day of April, 1966,

ORDERED, ADJUDGED AND DECREED that the Motion be, and the same is hereby denied.

/s/ R. B. Keech
R. B. Keech

/s/ Luther W. Youngdahl
Luther W. Youngdahl

/s/ Leonard P. Walsh
Leonard P. Walsh
JUDGES

[Filed April 7, 1966]

FINDINGS AND CONCLUSIONS

The Court, this 7th day of April 1966, makes the following findings of fact and conclusions of law:

Findings of Fact

1. That the respondent, Diana Kearny Powell, is a member of the Bar of this Court, having been admitted to practice on October 15, 1940.

2. That on or about January 26, 1965, the respondent signed, verified and filed in the United States District Court for the District of Columbia, a complaint in an action entitled Diana Kearny Powell v. Nicholas Katzenbach, Acting United States Attorney General, Civil Action No. 207-65.

3. That in the aforesaid complaint the respondent stated as follows:

"The Honorable Judge Alexander Holtzoff, on or about the 20th day of September, 1960, while sitting as judge in the United States District Court for the District of Columbia, knowingly and deliberately misstated and perverted the facts and law in rendering an oral decision in Civil Action No. 4051-55, knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation of the criminal law of the United States described in paragraph Two hereof, and refused to reconsider or correct the misstatement and perversion of the facts and law, then or in subsequent proceedings, and further,

"The Honorable Judge Warren Earl Burger, on or about the thirty-first day of July, 1960, in rendering a decision in the appeal from the decision of Judge Holtzoff described in paragraph Three hereof, Appeal No. 17,071, in the United States Court of Appeals for the District of Columbia Circuit, knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of Judge to pervert justice and aid and abet fraud and the commission of crime against the United States criminal code perpetrated by the National Savings and Trust Company, its Attorney Henry H. Paige, and Benjamin W. Dulany, in violation of 18 U.S.C. 645, 656, 1005, by deliberately falsifying the facts of record and the case law corruptly to obstruct and impede the due administration of justice, and thereafter refused to reconsider or correct the misstatement and perversion of fact and law when these were brought to his attention in subsequent proceedings.

"Plaintiff has exhausted every civil remedy, and because of the wealth and high office of the persons involved, cannot obtain effective criminal action through usual channels.

"WHEREFORE, Plaintiff respectfully prays this Honorable Court to issue process in the nature of a Writ of Mandamus to Nicholas Katzenbach, Acting Attorney General, or to the United States Attorney General, if appointed, to proceed with duties imposed under 5 U.S.C. 291, as amended, Sec. 311a, to prosecute violations of Title 18, U.S.C., including Secs. 645, 656, 1005, by a national bank or its agents, or by an officer of the United States, as hereinbefore described."

4. That the allegations of misconduct, fraud and corruption, made against Judge Alexander Holtzhoff and Judge Warren Earl Burger in the aforesaid complaint and set out above, were false and scandalous and were made by the respondent without justification or foundation in fact.

Conclusions of Law

The Court finds that the respondent, Diana Kearny Powell, is guilty of professional misconduct of the highest magnitude and conduct clearly prejudicial to the administration of justice.

/s/ R. B. Keech
/s/ Luther W. Youngdahl
/s/ Leonard P. Walsh
JUDGES

[Filed April 7, 1966] ORDER OF DISBARMENT

This matter having come on for hearing upon the charges filed by the Committee on Admissions and Grievances of this Court, and upon the sworn answer of the respondent, Diana Kearny Powell, and this matter having been fully heard in open court, and the Court having made Findings of Fact and Conclusions of Law upon the evidence adduced at the hearing and the briefs submitted by the parties, it is this 7th day of April, 1966,

ORDERED, that the respondent, Diana Kearny Powell, be, and she hereby is, disbarred from further practice of law before the bar of

this Court; and the Clerk of the Court is directed to strike the name of Diana Kearny Powell from the roll of attorneys admitted to practice before this Court, and it is further

ORDERED, That the respondent, Diana Kearny Powell, be and she hereby is, prohibited henceforth from holding herself out to be an attorney at law in the District of Columbia.

/s/ R. B. Keech
/s/ Luther W. Youngdahl
/s/ Leonard P. Walsh
JUDGES

[Filed April 11, 1966] NOTICE OF APPEAL

Notice is hereby given this 11th day of April, 1966, that

DIANA KEARNY POWELL, Respondent

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of April, 1966 striking the name of Diana Kearny Powell from the roll of attorneys and disbarring her from further practice of law before this Court

/s/ Diana Kearny Powell, pro se
1500 Massachusetts Ave., N.W.
Washington, D. C.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,181

DIANA KEARNY POWELL
Appellant,

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Appellee

APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EDMUND L. JONES
815 Connecticut Avenue, N.W.
Washington, D.C.

FRANCIS W. HILL, JR.
Tower Building
Washington, D.C.

ROGER ROBB
Tower Building
Washington, D.C.

Attorneys for Appellee, The Committee on Admissions and Grievances

QUESTIONS PRESENTED

In the opinion of the appellee, the questions presented are:

(1) Was the appellant, a member of the bar of the United States District Court, properly disbarred when the record disclosed that in a pleading signed, verified and filed by her in the District Court she alleged that a judge of the District Court and a judge of this Court were guilty of fraud, corruption and deliberate perversion of justice in performing their judicial duties, and when she repeatedly reiterated these allegations, which the District Court found were false and scandalous and were made by the appellant without justification or foundation in fact?

(2) When the appellant insisted at all times that the truth of her allegations against the two judges was patent on the face of the official records which were before them, and when it was stipulated at the appellant's trial that all of these records were in fact before the judges and might be considered by the District Court, did the District Court properly rule that on the appellant's cross-examination of the judges she would not be permitted to develop matters already established by the records?

(3) Was the District Court guilty of any unfairness or arbitrary action at the trial of the appellant?

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TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,181

DIANA KEARNY POWELL
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v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES
OF THE UNITED STATES DISTRICT COURT
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Appellee

APPEAL FROM A FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the United States District Court,[1] disbarring the appellant for professional misconduct and conduct prejudicial to the administration of justice. (JA 10)

The appellant was tried upon charges preferred by the Committee on Admissions and Grievances of the District Court and alleging:

---

[1] Judges Keech, Youngdahl and Walsh.

"1. That the respondent, Diana Kearny Powell, is a member of the bar of the United States District Court for the District of Columbia, having been admitted to practice on October 15, 1940.

"2. That on or about January 26, 1965, the respondent signed, verified and filed in the United States District Court for the District of Columbia, a complaint in an action entitled *Diana Kearny Powell v. Nicholas Katzenbach, Acting United States Attorney General,* Civil Action No. 207-65.

"3. That in the aforesaid complaint the respondent stated as follows:

'The Honorable Judge Alexander Holtzoff, on or about the 20th day of September, 1960, while sitting as judge in the United States District Court for the District of Columbia, knowingly and deliberately misstated and perverted the facts and law in rendering an oral decision in Civil Action No. 4051-55, knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation of the criminal law of the United States described in paragraph Two hereof, and refused to reconsider or correct the misstatement and perversion of the facts and law, then or in subsequent proceedings, and further,

'The Honorable Judge Warren Earl Burger, on or about the thirty-first day of July, 1960, in rendering a decision in the appeal from the decision of Judge Holtzoff described in paragraph Three hereof, Appeal No. 16,071, in the United States Court of Appeals for the District of Columbia Circuit, knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of judge to pervert justice and aid and abet fraud and the commission of crime against the United States criminal code perpetrated by the National Savings and Trust Company, its Attorney

Henry H. Paige, and Benjamin W. Dulany, in violation of 18 U.S.C. 645, 656, 1005, by deliberately falsifying the facts of record and the case law corruptly to obstruct and impede the due administration of justice, and thereafter refused to reconsider or correct the misstatement and perversion of fact and law when these were brought to his attention in subsequent proceedings.

'Plaintiff has exhausted every civil remedy, and because of the wealth and high office of the persons involved, cannot obtain effective criminal action through usual channels.

'WHEREFORE, Plaintiff respectfully prays this Honorable Court to issue process in the nature of a Writ of Mandamus to Nicholas Katzenbach, Acting Attorney General, or to the United States Attorney General, if appointed, to proceed with duties imposed under 5 U.S.C. 291 as amended, Sec. 311a, to prosecute violations of Title 18, U.S.C., including Secs. 645, 656, 1005, by a national bank or its agents, or by an officer of the United States, as hereinbefore described.'

"4. That the allegations of misconduct, fraud and corruption, made against Judge Alexander Holtzoff and Judge Warren Earl Burger in the aforesaid complaint and set out above, were false and scandalous and were made by the respondent without justification or foundation in fact.

"5. Upon the facts herein set forth, the Committee on Admissions and Grievances of the United States District Court for the District of Columbia believes and avers that the respondent, Diana Kearny Powell, has been guilty of professional misconduct and conduct prejudicial to the administration of justice." (Appellant's Supp. App. P. A-1)

In her answer[2] to the charges preferred by the Committee the appel-

[2] The answer is in the record before this Court.

lant admitted that she had signed, verified and filed the complaint containing the quoted accusations against Judge Holtzoff and Judge Burger. However, she stated:

> 'Respondent denies the allegations of paragraphs 4 and 5. She respectfully shows that the complaints which she made of misconduct, fraud and corruption do not constitute misconduct on her part which would subject her to suspension or disbarment from further practice of the law before the Bar of this Court because (a) they are proper statements of facts made in a pleading, using only the language necessary to describe the matters complained of; (b) they were addressed to the proper authority, that is, Nicholas Katzenbach, the Attorney General of the United States; (c) the matters complained of were true facts, patent in the records of this Court, the truth of which had been brought to the attention of the Committee on Admissions and Grievances; (d) the respondent acted in accordance with the highest standards of professional duty and ethics, as set forth in Canon 1 of the Canons of Professional Ethics, and for the purpose of protecting the public, the Court, and the profession from flagrant abuse."

At trial the appellant in her opening statement summarized the theory and grounds of her defense as follows:

> 'May it please the Court: In rebuttal of the charges which are made of unprofessional conduct, I expect to show that the charges made are founded in fact; that the facts, the true facts, herein, in this case, are in the record; that that record was before the Judges in question; and that in the course of the proceedings, notwithstanding the fact that it was before them, they misquoted the record and based their opinion upon misrepresentations which were patently false; and therefore that the statements made in the complaint which was addressed to a proper party,

> that is, the Attorney General of the United States, — a matter that was within his jurisdiction — were true and did have a foundation in fact." (TR pp. 5, 6)

The appellant reiterated this statement of her position during the course of the hearing. Thus, at page 17 in the transcript the following colloquy took place between Judge Keech, who was presiding, and the appellant:

> "JUDGE KEECH: Miss Powell, let me say this to you: It is your position in this matter on the face of the record — on the face of the record — that Judge Holtzoff and Judge Burger had facts before them, that they deliberately or with reckless abandon refused to make use of them, and therefore they are guilty of fraudulent acts.
>
> "MISS POWELL: That is essentially the position which I take."

Again, at page 30:

> "JUDGE KEECH: * * * we assume, you are going to argue that the records on their face clearly show that what was done was deliberately done with utter disregard of the facts in the case. And we are going to determine this matter on the record as it was before the Courts at that time.
>
> "MISS POWELL: Yes, Your Honor. That is what I am asking to be done.
>
> "JUDGE KEECH: Well, what we are saying to you is that the records speak for themselves. They have already been stipulated into the record." (TR. p. 30)

At page 56 of the transcript Judge Keech stated:

> "* * *you are saying to this Court that the record as it stands is so patently erroneous that your charges

> are justified. Therefore, you do not need to go beyond the four corners of the record.
>
> "That is your position, is it not?"

The appellant responded:

> "That is my position, Your Honor."

Counsel for the Committee stipulated at trial that all of the official records upon which the appellant relied were before Judge Holtzoff and Judge Burger when they took the actions of which the appellant complained and that such records might be considered by the District Court. (TR. pp. 17, 26, 30)

The Committee called as witnesses Judge Holtzoff, Judge Burger, Judge Prettyman and Judge Miller (Judge Prettyman and Judge Miller had participated with Judge Burger in the decision in *Powell v. National Savings and Trust Company*, No. 16,071 in this Court, the matter with respect to which the appellant alleged that Judge Burger had acted corruptly). All of the judges testified categorically that the appellant's allegations of fraud and corruption were completely without foundation. (Judge Holtzoff, TR. pps. 10, 11; Judge Burger, TR. p. 21; Judge Prettyman, TR. p. 43; Judge Miller, TR. p. 53)

At the conclusion of the trial the District Court allowed the appellant two weeks within which to file a brief in her behalf. (Tr. p. 80) She submitted an elaborate brief, which she has filed with this Court as "Appellant's Supplemental Appendix (Brief in U. S. District Court)." The appellant stated that this was a "brief setting forth the matters of record and argument upon which Respondent relies for her defense." (Brief, pp. 2, 3) Included in the brief, as "Appendix B to Respondent's Brief" was an "ANALYSIS OF PATENT MISREPRESENTATIONS of the record, facts, and the case law in opinions of Judge Holtzoff and Judge Burger about which there could be no bona fide question or mistake, prepared by Diana Kearny Powell."

Thereafter the District Court filed the following memorandum:[3]

"The Committee on Admissions and Grievances of the United States District Court for the District of Columbia has filed a complaint charging Diana Kearny Powell, a member of the bar of that Court with unprofessional conduct and conduct prejudicial to the administration of justice.

"The conduct in question consists, in essence, of charges by the respondent that Warren E. Burger, a Judge of the United States Court of Appeals for the District of Columbia Circuit, and Alexander Holtzoff, a Judge of the United States District Court for the District of Columbia, did knowingly and deliberately misstate or pervert the facts and law to aid and abet a fraud in violation of the criminal law.

"This matter came on for hearing on January 18, 1966, before Judges Keech, Youngdahl and Walsh. Roger Robb, Esq., and Francis W. Hill, Jr., Esq., appeared as attorneys for the Committee, and respondent appeared pro se. Before, and at, said hearing the Court accorded respondent an opportunity to get counsel. It was deemed advisable that she do so, inasmuch as the action from which these charges originated related to property in which respondent was personally interested.

"Upon the evidence adduced at the hearing and the briefs submitted by the parties, the Court finds that the charges respondent admittedly made against the aforesaid Judges are without foundation and completely false, and constitute professional misconduct of the highest magnitude and conduct clearly prejudicial to the administration of justice. The Court is therefore constrained to find the respondent guilty as charged.

"The Court will allow the respondent ten days within

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[3] The memorandum is in the record before this Court.

> which to file such memorandum as she may be advised to file, setting forth any matters (not now of record) which she may deem to be in mitigation of the conduct aforesaid. Counsel for the Committee, if so advised, may reply thereto within five days."

The respondent did not avail herself of the opportunity, afforded by the Court, to submit matters in mitigation of her conduct. Instead, she filed a motion to set aside the finding of guilty and to enter a judgment of not guilty. (JA 1-3) Among the grounds of her motion were the following:

> 'Respondent's Brief (B 1-6) conclusively shows by detailed cross-reference between the false statements and the facts of record and the cases cited that Judge Holtzoff aided fraud by the former trustee by misstatements of the will of Diana Kearny Powell in 8 particulars, of the record and evidence in Civil Action 4051-55 and the Administration 12,657 in 6 particulars, misstated the case law, and condoned patent fraud in at least 7 particulars.
>
> 'Respondent's Brief (B 6-20) conclusively shows by detailed cross-reference between the false statements and the facts of record and the cases cited that Judge Burger aided fraud by the former trustee by misstatements of the will of Diana Kearny Powell in approximately 35 particulars, of the record and evidence in approximately 40 particulars, and of the case law in approximately 21 particulars.
>
> * * *
>
> 'Respondent alleges prejudicial error that the case had been decided on the basis of her appearance *pro se*, and not on the evidence, and further alleges that the Court has arbitrarily excluded all evidence, although relevant, pertinent, and admitted, from its consideration solely because introduced by her *pro se*, and in support of her defense. * * *"

The Court denied the appellant's motion to set aside the finding of guilty and to enter a judgment of not guilty. (JA 7, 8) In separate findings of fact the Court found: "the allegations of misconduct, fraud and corruption, made against Judge Alexander Holtzoff and Judge Warren Earl Burger * * * were false and scandalous and were made by the respondent without justification or foundation in fact." (JA 10) The Court concluded as a matter of law that the appellant was "guilty of professional misconduct of the highest magnitude and conduct clearly prejudicial to the administration of justice." (JA 8-10) The Court ordered that the appellant be disbarred. (JA 10, 11)

The appellant contends on this appeal that she was denied a fair trial, and denied the right of free speech and the right to petition the government for redress of grievances, and that her right of cross-examination was unduly and arbitrarily limited.

SUMMARY OF ARGUMENT

I

The disbarment of the appellant was proper. The appellant repeatedly charged that a Judge of this Court and a Judge of the District Court were guilty of fraud, corruption and deliberate perversion of justice. The appellant failed to present any evidence in support of these allegations, and the District Court properly found that they were false and scandalous and were made by the appellant without justification or foundation in fact. This case therefore falls squarely within the rule of *Duke v. Committee on Grievances*, 65 App. D.C. 284, 82 F.2d 890, cert. den. 298 U.S. 662 (1936).

II

The appellant has at all times insisted that the truth of her allegations against the two judges is demonstrated by the official records which were before them when they made the decisions about which she

complains. It was stipulated at the appellant's trial that all of these records might be considered by the District Court. Since the validity of the charges against the appellant was to be determined on the record, the trial court properly declined to permit the appellant, by way of cross-examination of the judges who testified, to develop matters already shown by the record. The appellant was afforded an opportunity to cross-examine concerning matters not on the record. Furthermore, the appellant has failed to point to any prejudice which resulted to her from the limitation placed on her cross-examination.

III

The District Court was both fair and compassionate in dealing with the appellant and her charge of unfairness is completely unjustified.

ARGUMENT

I

In a complaint signed, verified and filed by her in Civil Action No. 207-63 in the District Court the appellant alleged that Judge Holtzoff and Judge Burger, in violation of their judicial duties, had been guilty of fraud, corruption and deliberate perversion of justice. In an attempt to justify her charges against the judges the appellant in effect re-argued the law and the facts of the case litigated before them; however, she did not point to a scintilla of evidence that would even remotely justify or in any way support her grievous accusations. The District Court properly found therefore that her charges were false and scandalous and were made without justification or foundation in fact.

This case falls squarely within the rule of *Duke v. Committee on Grievances*, 65 App. D.C. 284, 82 F.2d 890, cert. den. 298 U.S. 662 (1936). In the *Duke* case the record disclosed that Duke had charged that Justice Letts of the Supreme Court of the District of Columbia wilfully signed and caused to be forwarded to this Court a false bill of

exceptions, with the purpose of denying to an appellant his rights in the case. It appeared that Duke had repeated his charge on several occasions. Finding that the accusations made against Justice Letts were wholly unfounded and wrongful this Court held that Duke's conduct amounted to professional misconduct prejudicial to the administration of justice and merited disbarment.

In the case at bar the appellant has repeatedly reiterated her charges against Judge Holtzoff and Judger Burger. In the language of Justice Groner, concurring in the *Duke* case, the making of such charges and their "repeated reiteration is * * * unprofessional conduct of an aggravated nature and *** most reprehensible." (65 App. D.C. at 289)

The disbarment of the appellant was entirely proper.

II

The appellant in her brief argues that her cross-examination of the judges who testified was arbitrarily limited by the District Court. The appellant, however, has not pointed to any particular question, or any line of questioning, which was excluded to her prejudice. The appellant's argument might be rejected on this ground alone. In any event, the appellant has insisted at all times that the misconduct of Judge Holtzoff and Judge Burger is "patent" on the record. In her brief on this appeal, at page 11, she says:

> "Appellant has on the plain uncontradicted facts done nothing to render her unfit to practice law. The persons about whom she made complaint have been proved guilty of unprofessional conduct prejudicial to the proper administration of justice, by the proven facts of record. These facts were before the Committee and before the Court. (Supp. A.) The fact of the patent misstatement by the judges was a matter of record. The deliberate intent was to be inferred from the reaffirmation after the error had been brought to the attention of all involved, not once or twice, but numerous times."

It was stipulated at the appellant's trial that all of the pertinent records were before Judge Holtzoff and Judge Burger and might be considered by the District Court and used by the appellant in her effort to demonstrate the truth of her charges. As we have seen, she did in fact rely upon these records, by filing a voluminous "ANALYSIS OF PATENT MISREPRESENTATIONS of the record, facts, and the case law in opinions of Judge Holtzoff and Judge Burger about which there could be no bona fide question or mistake * * *." (App. B to Respondent's Brief before the District Court) Under these circumstances there was no error in the Court's refusal to permit the appellant, on cross-examination of the judges, to develop matters already established by the records and the stipulation of counsel. The Court ruled that on cross-examination she might develop matters not on the record, but she did not avail herself of the opportunity to do so. (TR. p. 16, 23, 34, 35, 40, 55, 56)

III

The District Court accorded the appellant an opportunity to obtain counsel, but she declined to do so. Having found her guilty, the Court allowed her ten days within which to file a memorandum setting forth matters in mitigation of her conduct. (See Memorandum of District Court, *supra*, page 7). The record demonstrates that the District Court dealt with respondent with complete fairness and compassion. Her charge that the Court was arbitrary and prejudiced against her is as groundless as her charges against Judge Holtzoff and Judger Burger.

CONCLUSION

The order of disbarment is fully supported by the record and should be affirmed.

Respectfully submitted,

EDMUND L. JONES
FRANCIS W. HILL, JR.
ROGER ROBB

Attorneys for Appellee
Committee on Admissions and
Grievances